No. 80-196

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

CITY OF SAN DIEGO, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator,

Petitioners,

v.

METROMEDIA, INC., a corporation, doing business as Foster & Kleiser, and PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Respondents.

On Writ Of Certiorari To The Supreme Court Of California

CONDITIONAL PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

The Supreme Court of California has construed 23 U.S.C. Section 131(g), as amended in November 1978, as requiring that just compensation be paid upon the removal of outdoor advertising signs lawfully erected under state law which are not permitted under subsection (c) of Section 131, and were in existence or subject to litigation on November 6, 1978, and located within 660 feet of federal primary or interstate highways, where such signs are caused to be removed by the City of San Diego under its zoning powers.[1]

The questions presented are:

1. Whether such interpretation is correct as applied to signs which are permitted by an agreement between the State of California and the United States Secretary of Transportation pursuant to subsection (d) of Section 131.

2. Whether such interpretation is correct as applied to signs which had become nonconforming uses and thereby illegal under the terms of the San Diego ordinance prior to the November 1978 amendment of Section 131, thereby giving said amendment retrospective effect.

3. Does Section 131, as so construed, violate the Tenth Amendment to the United States Constitution as an unreasonable infringement of the exercise of local police powers.

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[1] The California Supreme Court necessarily interpreted Section 131 because the California Outdoor Advertising Act (California Business & Professions Code, Section 5200 et seq.) requires payment of compensation for sign removal only where required by Section 131. Because of its interpretation of Section 131, the Court held that the State Act preempted the San Diego ordinance to a limited extent.

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The petitioners City of San Diego, the City Council of San Diego, and Voyd Beights, Zoning Administrator, respectfully pray that a writ of certiorari issue to review that portion of the decision of the California Supreme Court entered on April 14, 1980, as modified by order of May 14, 1980, holding that 23 U.S.C. Section 131(g) requires just compensation to be paid upon the removal of certain billboards where caused to be removed pursuant to the City of San Diego under its police powers, the writ to issue only in the event this Court should hear the appeal (or petition for writ of certiorari) in No. _____, at this Term, anticipated to be filed by respondents in this action.

OPINION BELOW

The opinion of the California Supreme Court, reported at 26 Cal.3d 848 (modification at 27 Cal.3d 144d) appears in the appendix hereto (Appendix A).

JURISDICTION

The judgment of the California Supreme Court was entered on April 14, 1980. A timely petition for rehearing was denied and the opinion modified on May 14, 1980 (Appendix C and D). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES INVOLVED

The following provisions involved in this case are set forth in the appendix hereto:

San Diego City Ordinance No. 10795 (New Series)	Appendix E
23 U.S.C. Section 131	Appendix F
Cal. Bus. & Prof. Code Section 5412	Appendix G
23 U.S.C. Section 131(g) & (k) prior to 1978 amendments	Appendix H
Tenth Amendment, U.S. Constitution	Appendix I

STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of the Act of October 22, 1965, 79 Stat. 1028, 23 U.S.C. Section 131, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. Section 2403(a) may be applicable.

STATEMENT OF THE CASE

On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795 (New Series) (Appendix E), an ordinance prohibiting and abating, with enumerated exceptions, all off-site outdoor advertising display signs.

Ordinance No. 10795 requires the abatement and removal of nonconforming signs without compensation upon the expiration of an amortization period. Appendix E-2.

Ordinance No. 10795 is contained in Chapter X ("Planning and Zoning") of the San Diego Municipal Code and recites as its purpose the elimination of excessive and confusing signs not related to the premises on which they are located; the elimination of hazards to pedestrians and motorists; to ensure signs are used as identification and not advertisement; to preserve and protect the appearance of the city; to protect the tourist industry by preventing the destruction of the natural beauty and environment of the city; to safeguard and enhance property values; and to protect public and private investment in buildings and open spaces. Appendix E-1.

Title 23 U.S.C. Section 131 as amended in 1978 by Public Law 95-599 (Appendix F), and known as the "Highway Beautification Act of 1965," requires that federal-aid highway funds shall be reduced by 10% for any state which does not provide for "effective control," as defined by the Act, of the erection and maintenance of outdoor advertising signs along the interstate and primary system highways. The Act also requires that just compensation shall be paid upon the removal of signs lawfully erected and not permitted under subsection (c) (Section 131(g)), and provides that subject to subsection (g) states may impose stricter limitations (Section 131(k)).

The California "Outdoor Advertising Act" (Cal. Bus. & Prof. Code Section 5200 et seq.) requires payment of just compensation for removal of signs if the federal law requires it (Bus. & Prof. Code Section 5412). Appendix G.

Pursuant to the terms of Section 131(d) the State of California entered into an agreement with the United States Secretary of Transportation in 1968 allowing signs under state regulations in commercial and industrial areas.

All of the signs owned by respondents existing in the City of San Diego are in commercial or industrial areas, some of which are within 660 feet of the interstate or primary system.

The respondent advertising companies filed actions in the Superior Court for the County of San Diego challenging the validity of Ordinance No. 10795. The actions were consolidated and each side brought motions for summary judgment against the other.

The Superior Court denied the petitioners' motion and granted respondents' motion, declaring the ordinance unconstitutional.

The complaints alleged the ordinance to be in conflict with 23 U.S.C. Section 131 and the California Outdoor Advertising Act (C.T. 9, 529). This issue was raised in the motions for summary judgment (C.T. 757 and 583) and the briefs on appeal. The trial court did not pass on this issue, deciding the case on the basis of the police power and the First Amendment instead. The Court of Appeal upheld the trial court concluding that the ordinance constituted an unreasonable exercise of the police power and alternatively that it conflicted with the State Outdoor Advertising Act in certain respects, including the requirement for payment of compensation upon removal under the State and Federal Acts (slip opinion, pp. 16-17).

An opinion dated March 11, 1976, of the Chief Counsel of the Federal Highway Administration concluded that

> The federal act requires payment of just compensation only for removal of signs lawfully erected and that when a sign becomes a nonconforming use under a local zoning ordinance it ceases to be lawfully erected within the meaning of the law.

This opinion was brought to the attention of the California Supreme Court by petitioners in their petition for hearing to that court in the context of interpretation of the effect of the Federal Act on the ordinance.

The California Supreme Court in its initial opinion (Appendix B) filed March 21, 1979, relying in part on this FHA opinion, concluded that the Federal Act did not require compensation where signs had become unlawful under local ordinances which were not enacted to carry out the terms of the Federal Act. Appendix B-26.

On November 6, 1978, subsections (g) and (k) of Section 131 were amended by Public Law 95-599 to require compensation for removal whether or not pursuant to or because of Section 131.

In their petition for rehearing in the California Supreme Court, respondents argued that the Court had relied on the language of Section 131(g) and (k) prior to the 1978 amendments and that the FHA had reversed its position expressed in the March 11, 1976 memorandum stating in a letter of December 5, 1978 that the prior opinion was overruled by the 1978 amendments.

Respondents also brought to the Court's attention a subsequent letter by the FHA, dated March 6, 1979, which concluded that these provisions, as amended, entitled all signs still in existence on November 6, 1978, or which were removed prior to that date but were the subject of litigation pending on that date, to compensation.

In their answer to the petition for rehearing, petitioners raised the issue of giving the 1978 amended provisions (subsections (g) and (k)) retrospective application (at pp. 4 and 5) and raised the issue of the Act, as amended and interpreted by FHA, violating the Tenth Amendment to the United States Constitution due to the effect it would have on local billboard controls under the police powers (at pp. 5-6).

After granting a rehearing, the California Supreme Court filed a new opinion (Appendix A) wherein it interpreted Section 131 as requiring compensation where removal was caused by local ordinance unrelated to the Federal Act and rejected petitioners' arguments as to retrospective effect and violation of the Tenth Amendment. Appendix A-30-31 and Appendix A-33.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of Another State Supreme Court

In the case of *Ackerley Communications, Inc. v. City of Seattle*, 602 P.2d 1177, 1184 (1979), the State Supreme Court of Washington construed 23 U.S.C. Section 131 to exclude from its provisions requiring compensation upon removal, all signs located in commercial and industrial zones which are not governed by an agreement between the State and the United

States Secretary of Transportation. This conclusion was based upon the premise that such signs are not regulated by and are wholly outside the scope of the statute.

The decision below reached a contrary conclusion, stating:

> We must respectfully disagree with the analysis of *Ackerley*. In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement--specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently, it requires compensation when those signs are removed.
>
> Appendix A-30.

2. The Decision Below Raises Important And Recurring Issues Concerning The Effect Of The Federal Statute On State And Local Efforts To Regulate Billboards And On The Possibility Of The Penalty Provisions Being Invoked Against The States

Because of the conflicting interpretations by the decision below and the Washington Supreme Court, uncertainty exists as to whether billboards located within 660 feet of interstate or primary system highways in commercial and industrial areas may be removed pursuant to state or local laws enacted under the police power without compensation.

Cities such as San Diego and Seattle, as well as others, and states and cities which may desire to enact similar laws causing the removal of such billboards may enforce existing laws or

enact such laws only at the risk of the Secretary of Transportation invoking the very substantial penalty of withholding 10% of the normal allocation of federal-aid highway funds to the states. Such a penalty would amount to millions of dollars for the states.

The decision below recognized the importance of the questions presented in stating:

> We reach that conclusion reluctantly, since its effect in this case and in future cases will probably frustrate the original intent of the Highway Beautification Act: to accelerate the removal of billboards and thereby "promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C. § 131(a)).[27]
>
> The 1978 amendments have, in effect, inverted the purpose of the act, making the secondary goal of insuring compensation dominant over the primary goal of encouraging billboard removal.
>
> Appendix A-31-32.

In footnote 27 in the above quote the decision below cited the statement of the Chief Counsel for the Federal Highway Administration as follows:

> The proposed amendment will have the effect of severely limiting local prerogatives to control outdoor advertising by turning the Highway Beautification Act into a statute which protects signs from local land use decisions and ensuring compensation, irrespective of the reason for

> removal. This would represent an unprecedented limitation on local zoning authorities. Traditionally, localities have controlled outdoor advertising, along with other types of non-conforming land uses, under the police power, which would allow removal by amortization.
>
> Appendix A-32.

Traditionally, zoning has been a matter of local concern. *Young v. American Mini Theatres*, 427 U.S. 50, 80, 49 L.Ed.2d 310, 332 (1976); *Village of Belle Terre v. Boras*, 416 U.S. 1, 39 L.Ed.2d 797 (1974).

Although a contention that Section 131 contravenes the Tenth Amendment to the United States Constitution was rejected by the court in *State of Vermont v. Brinegar*, 379 F.Supp. 606 (1974), the changes made in Section 131 by the 1978 amendments give rise to valid contentions of a violation of the Tenth Amendment.

The court in *State of Vermont v. Brinegar, supra*, said at p. 616:

> The standard adopted in *Darby* for measuring the constitutionality of federal legislation in light of the Tenth Amendment is that the federal government has the authority "to resort to all means for the exercise of a granted power which are *appropriate and plainly adopted to the permitted end.*" *United States v. Darby*, 312 U.S. at 124, 61 S.Ct. at 462.
>
> . . . .

> Thus, it appears that the court has postulated a two-tiered test for measuring the constitutionality of federal legislation under the Tenth Amendment:
>
> 1. Is the measure under attack *reasonably related* to a legitimately national end; and, if so,
>
> 2. Does the challenged enactment coerce the state into participating in the federal scheme or does it merely induce the state to act? [Emphasis added.]

This Court has stated that:

> . . . there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority *in that manner.* [Emphasis added.]
>
> *National League of Cities v. Usery*, 426 U.S. 833, 845, 49 L.Ed.2d 245 (1976).

Congress may not wield its power in a fashion that would impair the States' ability to function effectively in a federal system. *Fry v. United States,* 421 U.S. 542, 547, n. 7, 44 L.Ed.2d 363 (1975).

The Federal Act as amended in 1978, and interpreted by the decision below, goes much further in its effect upon local governments than it did in 1974 when analyzed by the court in *State of Vermont v. Brinegar, supra.* As so interpreted, the Act now requires compensation for removal of signs under the local

police power for reasons unrelated to the Act, even where those signs are in commercial and industrial areas and are allowed to remain there under Section 131(d) by agreement between the State and Secretary of Transportation.

Thus, as stated by the decision below, the purpose of the Act has been inverted. Although "effective control" by inducing the states to enact sign controls, including the payment of compensation for removal of signs not permitted under the Act, may have been its original purpose, the amendments have turned the purpose of the Act into one of requiring compensation for removal of signs under the local police powers for reasons unrelated by the Act under threat of withholding federal-aid monies.

Furthermore, when no federal monies are appropriated and none are authorized by the Act to remove signs in commercial and industrial areas because allowed by agreement under the terms of the Act, the stated purpose of the Act is completely frustrated.

Thus, Section 131 does not meet the test set forth in *Brinegar, supra*, in that it is not related to a legitimate national end and does not merely induce the state to act--it coerces it into going beyond the federal scheme in requiring compensation for removals unrelated to the Act.

The conditions imposed are thus arbitrary and not plainly adopted to the permitted end. *Steward Machine Co. v. Davis*, 301 U.S. 548, 80 L.Ed. 1279 (1937).

Furthermore, the decision below is clearly wrong in concluding that signs within commercial and industrial zones which

are allowed to remain pursuant to agreement under Section 131(d) must be compensated upon removal by local ordinance.

Subsection (c) of Section 131 does not exclusively define what signs are permitted as part of the definition of "effective control" and for purposes of subsection (g) requiring compensation for removal of signs not permitted under subsection (c). Signs are also permitted by the terms of subsection (d) in commercial and industrial areas by agreement. Thus, subsection (c) must be read in light of subsection (d).

Such construction was given in *State of Vermont v. Brinegar, supra*, 379 F.Supp. 606, 610, where the court said:

> . . . Subsection (c) of Section 131 does not enumerate the exclusive parameters for defining "effective control." It is significant that Subsection (c) states in pertinent part that "Effective control means that . . . signs, displays and devices [which are covered by the Act] *shall, pursuant to this section*, be limited to [signs of certain classes and descriptions]. . . ." (emphasis supplied). It is of crucial significance that in Subsection (c) of Section 131 Congress used the word "section" in directing the manner in which the signs are to be limited.

Additionally, the decision below was wrong in agreeing with FHA interpretation that the 1978 amendments were to apply retroactively to signs which had not previously been required to be compensated for upon removal. Nothing in the Act sets forth such an intent.

Where there is no clear intent to make legislation apply retrospectively it will not be so construed. *Greene v. United States*, 376 U.S. 149, 169 (1964).

CONCLUSION

If the Court determines probable jurisdiction in the respondents' appeal in No. _____, the Court should review the entire case, including the issues raised herein, and correct the error of the Court below for the foregoing reasons by granting this conditional petition for writ of certiorari.

Dated: August 6, 1980

Respectfully submitted,

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METROMEDIA, INC. v. CITY OF SAN DIEGO
26 Cal.3d 848; — Cal.Rptr. —, — P.2d —

[L.A. No. 30782. Apr. 14, 1980.]

METROMEDIA, INC., Plaintiff and Respondent, v.
CITY OF SAN DIEGO, Defendant and Appellant.

PACIFIC OUTDOOR ADVERTISING COMPANY, INC.,
Plaintiff and Respondent, v.
CITY OF SAN DIEGO et al., Defendants and Appellants.

SUMMARY

A metropolitan city enacted an ordinance banning off-site advertising billboards and requiring removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin enforcement. The trial court granted plaintiffs' motion for summary judgment, stating the ordinance was invalid as an unreasonable exercise of the police power and an abridgement of constitutional guarantees of freedom of speech and the press. The trial court then entered judgment enjoining enforcement of the ordinance. (Superior Court of San Diego County, Nos. 332881 and 333292, Jack R. Levitt, Judge.)

The Supreme Court reversed. The court held the achievement of the purposes cited in the ordinance, eliminating traffic hazards and improving the appearance of the city, represented proper objectives for the exercise of the city's police power, and the ordinance bears a reasonable relationship to those objectives. The court further held that a ban on commercial off-site billboards, enacted under the city's authority to regulate the commercial use of real property, did not abridge freedom of speech or press under either the United States or California Constitutions. The court pointed out the ordinance did not seek to suppress the content of the advertiser's message, served significant governmental interest, and left open adequate alternative means of communication. However, the court held the ordinance was partially preempted by state law. The court held that by requiring uncompensated removal of billboards within 660 feet of federal interstate and primary highways, the

ordinance endangered the state's share of federal highway funds, and thereby came into conflict with provisions of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) which required compensation when necessary to protect the state's receipt of federal monies. The court further held the ordinance's prohibition on construction of new billboards, and its provisions for uncompensated removal of billboards beyond the 660-foot limit, were not preempted by state law. The court rejected plaintiffs' contention that the city's failure to pay compensation for the removal of their billboards, in light of the state's payment of compensation to owners of billboards removed under the Outdoor Advertising Act, denied them equal protection of the law. The court also held the amortization period provided in the ordinance which ranged from one to four years depending on depreciated value of the sign, was not facially unreasonable, and the summary judgment therefore could not be sustained on that ground, although plaintiffs retained the right, and the burden of proving, the invalidity of the amortization period as applied to each particular structure. The court concluded that because plaintiffs failed to demonstrate the invalidity of the ordinance on its face, the trial court erred in granting their motion for summary judgment. (Opinion by Tobriner, J., with Bird, C. J., Mosk and Manuel, JJ., concurring. Separate concurring opinion by Richardson, J. Separate concurring opinion by Newman, J. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) **Advertising § 3—Regulation; Police Power—By Counties and Municipalities; Nuisances; Zoning—Off-site Billboards.**—A municipal ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, which recited the purpose of the ordinance as elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city, was valid as a proper application of municipal authority over zoning and land use for the purpose of promoting public safety and welfare. As a matter of law, an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety. Moreover, the improvement of the appear-

ance of the community falls within the city's authority under the police power. (Overruling *Varney & Green* v. *Williams* (1909) 155 Cal. 318 [100 P. 867], which held that esthetic considerations cannot justify the exercise of the police power to prohibit billboards. Also disapproving contrary language in *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785 [106 Cal.Rptr. 172, 505 P.2d 1012]; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 55 Cal.App.2d 765, 769 [63 Cal.Rptr. 543]; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal. App.2d 169, 173 [59 Cal.Rptr. 345]; *National Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375, 379 [27 Cal. Rptr.136]; and *City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188 [11 Cal.Rptr. 57].)

[See **Cal.Jur.3d,** Advertising, § 4; **Am.Jur.2d,** Advertising, § 4 et seq.]

(2) **Advertising § 3—Regulations; Police Power—By Counties and Municipalities; Nuisances; Zoning—Prohibition of Off-site Billboards.** —A city ordinance banning all off-site advertising and billboards requiring the removal of existing billboards following expiration of an amortization period, which reasonably related to the public safety and welfare, and which completely prohibited a business not found to be a public nuisance, was not invalid as an excessive exercise of the police power. The validity of the ordinance under the police power did not turn on its regulatory or prohibitory character, nor on the size of the city which enacted it, but solely on whether it reasonably related to the public safety and welfare.

(3) **Constitutional Law § 59—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights—Prohibition of Off-site Billboards.**—A municipal ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, enacted for the purpose of eliminating traffic hazards and improving the appearance of the city, was a proper exercise of the city's authority to regulate the commercial use of real property and did not, on its face, abridge freedom of speech guaranteed by U. S. Const., 1st Amend. Neither did the ordinance, on its face, violate the free speech clause of Cal. Const. art. I, § 2, where the ordinance did not seek to suppress the content of the advertiser's message, where it served significant

governmental interests (promoting traffic safety and improving the appearance of the community) unrelated to the suppression of free expression, and where the ordinance left open adequate alternative means of communication. Thus the ordinance was a permissible regulation of the time, place, and manner of speech.

(4a, 4b) **Advertising § 4—Regulation; Police Power—Outdoor Advertising Act—Prohibition of Off-site Billboards—Preemption.**—A city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period was preempted by the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) to the extent the ordinance required removal without compensation of billboards within 660 feet of federal interstate and primary highways for which compensation is required under 23 U.S.C. § 131, and Bus. & Prof. Code, § 5412, which requires payment of compensation for removal of billboards when such compensation is necessary to protect the state's share of federal highway funds. To that extent, the ordinance was invalid. However, the application of the ordinance to billboards not protected by federal law, that is, billboards more than 660 feet from federal interstate or primary highways, or billboards not in existence or removed subject to litigation prior to a certain date, was not preempted by the Outdoor Advertising Act. Moreover, the ordinance's prescription on erection of future billboards was likewise unaffected by the federal requirement for just compensation and thus not preempted by state law.

(5) **Statutes § 44—Construction—Aids—Contemporaneous Administrative Construction.**—Since the Federal Highway Administration is the agency charged with enforcement of the Highway Beautification Act of 1965 (23 U.S.C. § 131), its interpretation of the act is entitled to great weight and, if reasonable, should be sustained.

(6a, 6b) **Constitutional Law § 89—Equal Protection—Classification—Essential and Nonessential Characteristics—Reasonableness of Classification in Light of Legislative Purpose—Removal of Billboards—Compensation.**—Under a city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, the city's failure to pay compensation for the removal of billboards did not deny the owners thereof equal protection of the laws, even though

the state paid compensation to owners of billboards removed under the Outdoor Advertising Act. Since the distinction involved purely economic regulation it could be sustained if the classification bears a rational relationship to a legitimate state purpose. Thus, since state funds were augmented by a 75 percent federal contribution, the state could reasonably choose to pay compensation and thus eliminate billboards without concern for any amortization period, while the city, lacking such federally financed funds, could reasonably choose the more economical alternative of requiring abatement only after expiration of an amortization period.

(7) **Zoning and Planning § 21—Elimination of Nonconforming Uses.**—A city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: it can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period.

(8a-8c) **Zoning and Planning § 21—Elimination of Nonconforming Uses—Amortization Period.**—In an action by owners of billboards to enjoin the enforcement of a city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, summary judgment for plaintiffs on the ground that the amortization period prescribed by the ordinance was unreasonably short and thus denied due process, could not be sustained. The amortization period, which ranged from one to four years depending on the depreciated value of the sign, was not unreasonable on its face. Moreover, plaintiffs had the burden of proving the invalidity of the amortization period as applied to each structure, but on motion for summary judgment plaintiffs did not attempt to meet the burden as to each structure, limiting their claim to the argument that the abatement schedule was facially unconstitutional as not being based on the fair market value or remaining useful life of the billboards.

(9) **Zoning and Planning § 21—Elimination of Nonconfirming Uses—Amortization Period.**—Zoning legislation may validly provide for the eventual termination of nonconfirming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. The termination of

the length of a reasonable period of amortization is not merely a matter of accounting. The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail. Relevant factors include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes and depreciation for other purposes and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area.

(10a, 10b) **Zoning and Planning § 21—Elimination of Nonconforming Uses—Amortization Period—Billboards.**—The reasonableness of an amortization period as applied to each billboard where removal was required pursuant to a city ordinance depended in part on facts peculiar to that structure, including the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period. However, even though the fair market value and remaining useful life are relevant considerations, the failure of the city to base its abatement schedule on such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact the city arrived at that period by a formula which did not include every one of the relevant considerations does not render the ordinance unconstitutional.

(11) **Summary Judgment § 27—Appellate Review—Presenting and Reserving Objections.**—In an action by billboard owners to enjoin enforcement of an ordinance banning all off-site advertising billboards, summary judgment in their favor could not be sustained on the ground the city council failed to comply with the California Environmental Quality Act in enacting the ordinance, where plaintiffs did not allege such noncompliance, and where, although over three years elapsed between the filing of the complaint and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. Accordingly, the issue of the city's alleged noncompliance with the act was not properly before the trial court on the motion for summary judgment, and

could not be asserted on appeal as a ground for sustaining that judgment.

COUNSEL

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OPINION

TOBRINER, J.—The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin its enforcement. Upon motion for summary judgment, the superior court

adjudged the ordinance unconstitutional, and issued the injunction as prayed.

We reject the superior court's conclusion that the ordinance exceeded the city's authority under the police power. We hold that the achievement of the purposes recited in the ordinance—eliminating traffic hazards and improving the appearance of the city—represent proper objectives for the exercise of the city's police power, and that the present ordinance bears a reasonable relationship to those objectives. We reject also the lower court's alternative holding that the ordinance violates the First Amendment; judicial decisions demonstrate that a ban on commercial off-site billboards, enacted under the city's authority to regulate the commercial use of real property, does not abridge freedom of speech or press.

We agree with plaintiffs, however, that the San Diego ordinance is partially preempted by state law. By requiring uncompensated removal of billboards within 660 feet of federal interstate and primary highways, the ordinance endangers the state's share of federal highway funds; the ordinance thereby comes into conflict with provisions of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) which require compensation when necessary to protect the state's receipt of federal monies. The ordinance's prohibition on construction of new billboards, and its provisions for uncompensated removal of billboards beyond the 660-foot limit, are not preempted by state law.

Plaintiffs also urge that we sustain the summary judgment on a variety of other grounds; they contend that it denies the equal protection of the law; that its amortization provisions are facially unreasonable; and that the city failed to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). For the reasons we set forth, we conclude that none of these grounds will sustain the judgment below.

We conclude that the judgment of the superior court should be reversed and the case remanded to that court for further proceedings. At that time the court may determine which if any of plaintiffs' billboards fall within the preemptive scope of the Outdoor Advertising Act and render judgment that the ordinance may not be validly applied to require uncompensated removal of such billboards.

1. *Summary of proceedings in the trial court.*

The present case concerns the constitutionality of San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. With limited exceptions specified in the footnote,[1] the ordinance as subsequently amended prohibits all off-site "outdoor advertising display signs."[2] Off-site signs are defined as those which do not identify a use, facility or service located on the premises or a product which is produced, sold or manufactured on the premises. All existing signs which do not conform to the requirements of the ordinance must be removed following expira-

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[1]The original ordinance permitted the following off-site signs: Signs maintained in the discharge of a governmental function; bench advertising signs; commemorative plaques, religious symbols, holiday decorations and similar such signs; signs located within shopping malls not visible from any point on the boundary of the premises; signs designating premises for sale, rent or lease; public service signs depicting time, temperature or news; signs on vehicles conforming to city regulations; and temporary off-premises subdivision directional signs.

As originally enacted, the ordinance contained no exception for political signs. On October 19, 1977, the city council amended the ordinance to permit "Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain." (Ord. No. 12189 (New Series).) This amendment may have been prompted by the decision of the Ninth Circuit in *Baldwin* v. *Redwood City* (9th Cir. 1976) 540 F.2d 1360, in which that court held an ordinance regulating temporary signs to be an unconstitutional restriction upon political speech.

[2]The ordinance does not define the term "outdoor advertising display signs." The history of the ordinance and the arguments of the parties demonstrate that the purpose of the ordinance is the prohibition of commercial billboards. But although the amended ordinance excludes signs which fall within 12 specific exceptions, it fails to exclude many varieties of less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard. That failure, in light of the absence of a definition of the class of signs prohibited, suggests a danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message.

To avert that danger, and to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail, we adopt a narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment. (Cf. *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 506-507 [134 Cal.Rptr. 668, 556 P.2d 1119]; *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, 144-145 [109 Cal.Rptr. 897, 514 P.2d 697].) We find such a construction in the definition of the term "outdoor advertising display" in Revenue and Taxation Code section 18090.2: "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Although that specific definition was not before the San Diego City Council when it adopted Ordinance No. 10795, incorporation of that definition into the ordinance will fulfill the city's purpose of banning permanent structures used predominantly for commercial advertising, while avoiding the constitutional issues raised by a less certain or more expansive reading of the ordinance.

tion of an amortization period, ranging from 90 days to 4 years depending upon the location and depreciated value of the sign.

Plaintiffs, Metromedia, Inc., and Pacific Outdoor Advertising Company, Inc., are engaged in the outdoor advertising business and own a substantial number of off-site billboards subject to removal under Ordinance No. 10795. Plaintiffs filed separate actions against the city, attacking the validity of the ordinance. The actions were consolidated by stipulation.[3] After extensive interrogatories and requests for admission had been answered all parties moved for summary judgment.

To facilitate the determination of the motion for summary judgment the parties entered into a stipulation of facts. The following portions of that stipulation are particularly pertinent to the present appeal: "2. If enforced as written Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego. . . . 13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego. . . . 17. The displays have varying values depending upon their size, nature and location. 18. Each of the displays has a fair market value as a part of an income-producing system of between $2,500 and $25,000. 19. Each display has a remaining useful income-producing life in excess of 25 years. 20. All of the signs owned by plaintiffs in the City of San Diego are located in areas zoned for commercial and industrial purposes . . . . 28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive. . . . 31. Many of plaintiffs' signs are within 660 feet and others are within 500 feet of interstate or federal primary highways. . . . 34. The amortization provisions of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship."[4]

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[3]Defendants in the consolidated action are the city, the members of the city council, and the city planning director.

[4]Plaintiffs filed no declaration to support the motion for summary judgment, but relied solely upon the pleadings, the city's response to interrogatories, and the agreed stipulation of facts.

The trial court filed a memorandum opinion stating that the ordinance was invalid as an unreasonable exercise of police power and an abridgment of First Amendment guaranties of freedom of speech and press. The court then entered judgment enjoining enforcement of the ordinance. The city appeals from that judgment.

2. *The summary judgment cannot be sustained on the ground that the San Diego ordinance exceeds the city's authority under the police power.*

(1a) The San Diego ordinance, as we shall explain, represents a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.[5] The ordinance recites the purposes for which it was enacted,[6] including the elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city. Since these goals are proper objectives for the exercise of the city's police power, the city council, asserting its legislative judgment, could reasonably believe the instant ordinance would further those objectives.

Plaintiffs cannot question that a city may enact ordinances under the police power to eliminate traffic hazards. They maintain, however, that the city failed to prove in opposition to plaintiffs' motion for summary judgment that the ordinance reasonably relates to that objective. We could reject plaintiffs' argument on the simple ground that plaintiffs, as the parties asserting the unconstitutionality of the ordinance, bear the burden of proof (see *Associated Home Builders etc., Inc.* v. *City of Livermore, supra*, 18 Cal.3d 582, 609), and cannot rely upon the city's

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[5]An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 604 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038]; *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479].)

[6]Part A of the ordinance declares: "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

failure of proof. To avoid unnecessary litigation upon remand of this cause, however, we have probed plaintiffs' broader argument: We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.

Billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway. Whether this distracting effect contributes to traffic accidents invokes an issue of continuing controversy.[7] But as the New York Court of Appeals pointed out, "mere disagreement" as to "whether billboards or other advertising devices . . . constitute a traffic hazard . . . may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable." (*New York State Thruway Auth.* v. *Ashley Motor Ct.* (1961) 10 N.Y.2d 151 [218 N.Y.S.2d 640, 176 N.E.2d 566].) Many other decisions have upheld billboard ordinances on the ground that such ordinances reasonably relate to traffic safety;[8] we cannot find it manifestly unreasonable for the San Diego City Council to reach the same conclusion. As the Kentucky Supreme Court said in *Moore* v. *Ward* (Ky. 1964) 377 S.W.2d 881, 884: "Even assuming [plaintiffs] could produce substantial evidence that billboard signs do not adversely affect traffic safety, . . . the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature."

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[7]"No matter what one's position on the sign and safety issue one can find the study to support it . . . . [D]espite the insights provided by statistical analyses, the case for the hazards of private signs rests largely upon common sense and the informed judgments of traffic engineers and other experts. The arguments are complex and sometimes highly technical, but on the whole, the courts are increasingly likely to conclude that regulation of private signs may be reasonably expected to enhance highway safety." (Dowds, *Private Signs and Public Interests*, in 1974 Institute on Planning, Zoning and Eminent Domain, p. 231.)

[8]See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785 [106 Cal.Rptr. 172, 505 P.2d 1012]; *E.B. Elliott Adv. Co.* v. *Metropolitan Dade County* (5th Cir. 1970) 425 F.2d 1141, 1152; *General Outdoor Adv. Co.* v. *Department Pub. Works* (1935) 289 Mass. 149, 171 [193 N.E. 799]; *Newman Signs, Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, 757, app. dism. (1979) 440 U.S. 901 [59 L.Ed.2d 449, 99 S.Ct. 1205]; *Opinion of the Justices* (1961) 103 N.H. 268 [169 A.2d 762]; *United Advertising Corp.* v. *Metuchen* (1964) 42 N.J. 1, 4 [198 A.2d 447]; *State* v. *Lotze* (1979) 92 Wn.2d 52 [593 P.2d 811, 813-814], app. dism. — U.S. — [62 L.Ed.2d 177, 100 S.Ct. 257]; *Markham Advertising Co.* v. *State* (1978) 73 Wn.2d 405, 416 [439 P.2d 248], app. dism. (1969) 393 U.S. 316 [21 L.Ed.2d 512, 89 S.Ct. 553].

We further hold that even if, as plaintiffs maintain, the principal purpose of the ordinance is not to promote traffic safety but to improve the appearance of the community, such a purpose falls within the city's authority under the police power. In contending that aesthetic considerations cannot justify the exercise of the police power to prohibit billboards, plaintiffs rely on *Varney & Green* v. *Williams* (1909) 155 Cal. 318 [100 P. 867], which held unconstitutional an ordinance of the City of East San Jose prohibiting all advertising billboards. Asserting that the ordinance rested solely on the "promotion of aesthetic or artistic considerations," we stated that "it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property . . . ." (*Id.* at p. 320, quoting *City of Passaic* v. *Patterson Bill Posting Co.* (1905) 72 N.J.L. 285, 287 [62 A. 267].)

Constrained by this precedent, subsequent California Court of Appeal decisions have stated that aesthetic considerations cannot justify an ordinance prohibiting billboards. (See *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 255 Cal.App.2d 765, 769 [63 Cal.Rptr. 543]; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal.App.2d 169, 173 [59 Cal.Rptr. 345]; *National Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375, 379 [27 Cal.Rptr. 136].) Only one decision, however, has actually invalidated a city ordinance on this ground. (*City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188, 191-194 [11 Cal.Rptr. 57].) In all other cases the courts have found some additional ground for the ordinance, such as elimination of driving hazards or promotion of tourist traffic. Relying on such additional grounds, the cases conclude that the ordinance did not become unconstitutional merely because aesthetic considerations may have played some part in motivating its enactment.[9]

Thus we could distinguish the present case from *Varney & Green* v. *Williams, supra*, 155 Cal. 318, on the ground that the present ordinance was not enacted exclusively for aesthetic purposes. We believe, however, that the holding of *Varney & Green* v. *Williams*, that aesthetic purposes alone cannot justify assertion of the police power to ban

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[9]See *Desert Outdoor Advertising Inc.* v. *County of San Bernardino, supra*, 255 Cal.App.2d 765, 769; *County of Santa Barbara* v. *Purcell, Inc., supra*, 251 Cal.App.2d 169, 173; *Burk* v. *Municipal Court* (1964) 229 Cal.App.2d 696, 701-702 [40 Cal.Rptr. 425]; *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, 273 [30 Cal.Rptr. 731]; *National Advertising Co.* v. *County of Monterey, supra*, 211 Cal.App.2d 375, 378-379; see also *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra*, 8 Cal.3d 785, 790.

billboards, is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation.

Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value. Consequently any distinction between aesthetic and economic grounds as a justification for billboard regulation must fail. "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." (*Metromedia, Inc.* v. *City of Pasadena, supra*, 216 Cal.App.2d 270, 273; *Burk* v. *Municipal Court, supra*, 229 Cal.App.2d 696, 702.)

The holding of *Varney & Green* v. *Williams* also conflicts with present concepts of the police power. Most jurisdictions now concur with the broad declaration of Justice Douglas in *Berman* v. *Parker* (1954) 348 U.S. 26 [99 L.Ed. 27, 75 S.Ct. 98]: "The concept of the public welfare is broad and inclusive. [Citation.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Id.*, at p. 33 [99 L.Ed. at p. 38].) Although Justice Douglas tendered this description in a case upholding the exercise of the power of eminent domain for community redevelopment, it has since been recognized as a correct description of the authority of a state or city to enact legislation under the police power. (*Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1, 5-6 [39 L.Ed.2d 797, 801-802, 94 S.Ct. 1536]; *City of Phoenix* v. *Fehlner* (1961) 90 Ariz. 13, 17 [363 P.2d 607]; *People* v. *Stover* (1963) 12 N.Y.2d 462; 467-468 [240 N.Y.S.2d 734, 191 N.E.2d 272]; *Oregon City* v. *Hartke* (1965) 240 Ore. 35, 48 [400 P.2d 255]; *Markham Advertising Co.* v. *State, supra*, 73 Wn.2d 405, 424.) As the Hawaii Supreme Court succinctly stated: "We accept beauty as a proper community objective, attainable through use of the police power." (*State* v. *Diamond Motors, Inc.* (1967) 50 Hawaii 33, 36 [429 P.2d 825].)[10]

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[10]Among other decisions holding that a state or city pursuant to the police power may ban billboards on the basis of aesthetic considerations alone are: *Meritt* v. *Peters* (Fla. 1953) 65 So.2d 861; *John Donnelly & Sons* v. *Mallar* (D.Me. 1978) 453 F.Supp. 1272; *Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660 [370 A.2d 1127, 1133]; *E.B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra*, 425 F.2d 1141, 1151; *Stuckey's Stores, Inc.* v. *O'Cheskey* (1979) — N.M. — [600 P.2d 258, —]; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263 [279 N.Y.S.2d 22, 225 N.E.2d 749, 21 A.L.R.3d 1212]; *Opinion of the Justices, supra*, 103 N.H. 268; *Mark-*

Present day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life. Many municipalities engage in projects of one type or another designed to beautify their communities. Indeed, *Varney & Green* v. *Williams* itself asserted "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed." (155 Cal. 318, 320.) But as the New York Court of Appeals pointed out, "Once it be conceded that aesthetics is a valid subject of legislative concern the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. . . . [W]hether such a statute or ordinance should be voided should depend upon whether the restriction was 'an arbitrary and irrational method of achieving an attractive . . . community—and *not* upon whether the objectives were primarily aesthetic.'" (*People* v. *Stover, supra*, 12 N.Y.2d 462.)

In a subsequent decision, the New York Court of Appeals confirmed that aesthetic considerations may justify the exercise of the police power to ban all off-site billboards in a community. (*Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263], app. dism., 439 U.S. 808 [58 L.Ed.2d 101, 99 S.Ct. 66].) "It cannot be seriously argued," the New York court said, "that a prohibition of this nature is not reasonably related to improving the aesthetics of the community." (*Id.*, at p. 490.)[11] The fact that the ordi-

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ham Advertising Co. v. *State, supra*, 73 Wn.2d 405, 424; *John Donnelly & Sons* v. *Outdoor Advertising Bd.* (1970) 369 Mass. 206 [339 N.E.2d 709].

Indeed, the four cases cited in *Varney & Green* v. *Williams* to support the proposition that aesthetic considerations will not uphold a prohibition on billboards are no longer law in their respective jurisdictions. *City of Passaic* v. *Patterson Bill Posting Co., supra*, 73 N.J.L. 285, was repudiated by the New Jersey Constitution in 1947. *Commonwealth* v. *Boston* (1905) 188 Mass. 348 [74 N.E. 601], was overruled in *General Outdoor Advertising Co.* v. *Dept. of Public Works* (1935) 289 Mass. 149, 159-161 [193 N.E. 799]; *Bryan* v. *City of Chester* (1905) 212 Pa. 259 [61 A. 894], was distinguished as antedating enactment of zoning enabling legislation by the court in *Silver* v. *Zoning Board* (1955) 381 Pa. 41 [112 A.2d 84]. *People* v. *Green* (1903) 85 App.Div. 400 [83 N.Y.S. 460] was rejected in *People* v. *Stover, supra*, 12 N.Y.2d 462, 466-467, and *Matter of Cromwell* v. *Ferrier, supra*, 19 N.Y.2d 263, 270.

[11]Numerous cases have commented on the unaesthetic impact of highway billboards. (See, e.g., *State* v. *Diamond Motors, supra*, 50 Hawaii 33, 36; *United Advertising Corp.* v. *Metuchen, supra*, 42 N.J. 1, 6; *Markham Advertising Co.* v. *State, supra*, 73 Wn.2d 405, 417.) Public opinion surveys sponsored by the Federal Highway Beautifi-

nance bans billboards in commercial and industrial areas, and that it permits on-site signs, does not demonstrate that the ordinance as a whole lacks a reasonable relationship to improving community appearance. (*E.B. Eiliott Adv. Co.* v. *Metropolitan Dade County, supra*, 425 F.2d 1141, 1152.) "[T]he notion that an extensively commercial or industrial area will be made more attractive by the absence of billboards is open to debate. Since the issue is debatable, however, the modern judicial presumption in favor of legislation [requires the court] to uphold the ordinance as a rational means of enforcing the legislative purpose of preserving aesthetics." (Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future* (1977) 6 Envt'l Aff. 179, 188.)

If the San Diego ordinance reasonably relates to the public safety and welfare, it should logically follow that the ordinance represents a valid exercise of the police power. (2) Plaintiffs contend, however, that the police power is subject to an additional limiting doctrine: That regardless of the reasonableness of the act in relation to the public health, safety, morals and welfare the police power can never be employed to prohibit completely a business not found to be a public nuisance.

This argument also rests on our decision in *Varney & Green* v. *Williams, supra*, 155 Cal. 318. There the court, as an alternative ground for its decision, held the East San Jose ordinance unconstitutional on the grounds that it did "not attempt. . . regulation, but undertakes to absolutely forbid the erection or maintenance of any bill-board for advertising purposes." (P. 321.) No California decision since *Varney & Green* has invalidated a billboard ordinance as prohibitory, but a few decisions of other states have struck down billboard ordinances on this ground. (See *Combined Communications Corp.* v. *City & Cty., Denver* (1975) 189 Colo. 462 [542 P.2d 79, 82-83]; *Metromedia, Inc.* v. *City of Des Plains* (1975) 26 Ill.App.3d 942 [326 N.E.2d 59, 61-62]; *Stoner McCray System* v. *City of Des Moines* (1956) 247 Iowa 1313, 1319-1320 [78 N.W.2d 843, 58 A.L.R.2d 1304]; *Norate Corp., Inc.* v. *Zoning Board of Adjustment* (1955) 417 Pa. 397, 407 [207 A.2d 890].)

For the reasons we shall offer, however, we believe that this doctrine, too, conflicts with reality and with current views of the police power. The distinction between prohibition and regulation in this case is one of words and not substance. "[E]very regulation necessarily speaks as a

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cation Commission indicate that the general public agrees that billboards are unsightly. (See Dowds, *Private Signs and Public Interests, op. cit. supra*, p. 233.)

prohibition." (*Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 592 [8 L.Ed.2d 130, 133, 82 S.Ct. 987].) In the present case, for example, plaintiffs describe the ordinance as a *prohibition of off-site advertising*, while the city describes it as a *regulation of advertising*, one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between "regulation" and "prohibition," and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292 [40 A.2d 177, 156 A.L.R. 568]; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra*, 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse, supra*, 43 N.Y.2d 483; *Matter of Cromwell* v. *Ferrier, supra*, 19 N.Y.2d 263.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills* v. *Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 502-504 [108 Cal.Rptr. 271], and cases there cited; see *Associated Home Builders etc., Inc.* v. *City of Livermore, supra*, 18 Cal.3d 582, 606, fn. 23.) As the Oregon Supreme Court explained in *Oregon City* v. *Hartke, supra*, 240 Ore. 35, "[I]t is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . . It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." (Pp. 49-50.)

Plaintiffs stress that most of the cases upholding a community ban on billboards or other commercial uses have involved small, predominantly residential, towns or rural localities. Recently, however, the Massachusetts Supreme Judicial Court upheld an ordinance similar to the one at issue here involving a total prohibition of billboards in a densely populated town with a sizable business and industrial district. (*John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra*, 339 N.E.2d

709.) The court there stated that "We believe that it is within the scope of the police power for the town to decide that its total living area should be improved so as to be more attractive to both its residents and its visitors. Whether an area is urban, suburban or rural should not be determinative whether the residents are entitled to preserve and enhance their environment. Urban residents are not immune to ugliness." (P. 720.)

Relying on the cited Massachusetts decision, the United States District Court for the District of Maine recently upheld a statewide ban on off-site commercial billboards, including urban regions within the state. Its decision observes that it "can find no rational basis for concluding . . . that residents of and visitors to urban, commercial or industrial districts are not entitled to the benefit of an aesthetically pleasing environment, while those living in or visiting suburban, residential or rural regions are." (*John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272, 1281.)

Nor do we perceive how we could rationally establish a rule that a city's police power diminishes as its population grows, and that once it reaches some unspecified size it no longer has the power to prohibit billboards. San Diego, for example, has already prohibited billboards within *97 percent of its limits*—a region which in area and population far surpasses most California cities. Plaintiffs claim that a ban covering 97 percent of the city is a "regulation," while the extension of that ban to the remaining 3 percent of the city is a "prohibition," but such sophistry is a mere play upon words.

Thus the validity of Ordinance No. 10795 under the police power does not turn on its regulatory or prohibitory character, nor upon the size of the city which enacted it, but solely on whether it reasonably relates to the public safety and welfare. **(1b)** As we have explained, the ordinance recites that it was enacted to eliminate traffic hazards, improve the appearance of the community, and thereby protect property values. The asserted goals are proper objectives under the police power, and plaintiffs have failed to prove that the ordinance lacks a reasonable relationship to the achievement of those goals. We conclude that the summary judgment cannot be sustained on the ground that the ordinance exceeds the city's authority under the police power.[12]

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[12]*Varney & Green* v. *Williams, supra*, 155 Cal. 318, is hereby overruled. Language in the following cases contrary to the views expressed herein is disapproved; *City of Es-*

3. *The summary judgment cannot be sustained on the ground that the San Diego ordinance on its face abridges freedom of speech.*

(3) Although the trial court held that the San Diego ordinance unconstitutionally invaded the First Amendment rights of billboard advertisers, controlling precedent invalidates that conclusion. On almost every occasion in which a law which prohibited off-site commercial billboards has been challenged as an abridgment of freedom of speech, the courts have rejected that challenge and sustained the law. (See *Howard* v. *State Department of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581; *John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra*, 339 N.E.2d 709; *Donnelly Advertising Corp.* v. *City of Baltimore, supra*, 370 A.2d 1127, 1132; *Newman Signs, Inc.* v. *Hjelle, supra*, 268 N.W.2d 741, 760-762; *United Advertising Corp.* v. *Borough of Raritan*, (1952) 11 N.J. 144 [93 A.2d 362]; *Stuckey's Stores, Inc.* v. *O'Cheskey, supra*, 600 P.2d 258; *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra*, 43 N.Y.2d 483; *Lubbock Poster Co.* v. *City of Lubbock* (Tex.Crim. App. 1978) 569 SW.2d 935, 945; *Ackerley Communications, Inc.* v. *City of Seattle* (1979) 92 Wn.2d 905 [602 P.2d 1177]; *State* v. *Lutze, supra*, 593 P.2d 811, 813-815; *Markham Advertising Co.* v. *State, supra*, 73 Wn.2d 405.)[13]

Plaintiffs note that some of the decisions in point relied heavily on *Valentine* v. *Christensen* (1942) 316 U.S. 52 [86 L.Ed. 1262, 62 S.Ct.

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condido v. *Desert Outdoor Advertising, Inc., supra*, 8 Cal.3d 785; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino, supra*, 255 Cal.App.2d 765; *County of Santa Barbara* v. *Purcell, Inc., supra*, 251 Cal.App.2d 169; *National Advertising Co.* v. *County of Monterey, supra*, 211 Cal.App.2d 375; *City of Santa Barbara* v. *Modern Neon Sign Co., supra*, 189 Cal.App.2d 188.

[13]The only exception is an unreported decision of a Colorado district court in Combined Communications Corporation v. City and County of Denver, cited in the trial court's memorandum opinion. The Colorado Supreme Court subsequently affirmed the decision without discussion of the First Amendment issue. (*Combined Communications Corp.* v. *City & Cty., Denver* (1975) 189 Colo. 462 [542 P.2d 79].)

The Oklahoma Supreme Court in *State* ex rel. *Dept. of Transp.* v. *Pile* (1979) 603 P.2d 337 held a state law prohibiting the erection of billboards within 660 feet of federal highways in rural areas violated an Oklahoma constitutional free speech provision as applied to prohibit a noncommercial billboard. The opinion is cast in broad terms which imply that the federal Highway Beautification Act and all state laws enacted to conform to that act abridge freedom of speech. The specific holding of the court, however, is limited to a question of Oklahoma constitutional law, and is distinguishable on several counts from the present case.

920], in which the Supreme Court declared that "the Constitution imposes no...restraint on government as respects purely commercial advertising." (*Id.*, at p. 54 [86 L.Ed. at p. 1265].) Within the last five years, a series of that court's decisions have repudiated *Valentine* v. *Christensen* and held that commercial speech may command First Amendment protection. (*Bigelow* v. *Virginia* (1975) 421 U.S. 809 [44 L.Ed.2d 600, 95 S.Ct. 2222]; *Pharmacy Bd.* v. *Va. Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817]; *Linmark Associates, Inc.* v. *Willingboro* (1977) 431 U.S. 85 [52 L.Ed.2d 155, 97 S.Ct. 1614]; *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691].) Plaintiffs contend that as a result of these decisions, a law prohibiting commercial billboards can no longer be sustained.

When first presented to us, plaintiffs' First Amendment contention presented an arguable issue. While this case was pending before us, however, the New York Court of Appeal, in *Suffolk Outdoor Advertising Co.* v. *Hulse, supra*, 43 N.Y.2d 483, upheld a community-wide ban on off-site billboards. The advertising company appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. (439 U.S. 808 [58 L.Ed.2d 101, 99 S.Ct. 66].) Subsequently the court also dismissed appeals in two cases which sustained state laws banning off-site billboards outside of commercial or industrial areas. (*Newman Signs, Inc.* v. *Hjelle, supra*, 268 N.W.2d 741; *State* v. *Lotze, supra*, 593 P.2d 811.)

Each of the cited cases in which the Supreme Court dismissed appeals expressly rejected the contention that a prohibition on off-site billboards conflicts with the reasoning of the commercial speech cases. Since the Supreme Court regards the dismissal of an appeal as a decision on the merits (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345 [45 L.Ed.2d 223, 235-237, 95 S.Ct. 2281]), we conclude that the high court has resolved that a prohibition of off-site billboards does not violate the First Amendment.

An issue remains as to whether the San Diego ordinance violates the free speech clause of the California Constitution. (Art. I, § 2.) We therefore set forth our reasons for concluding that the San Diego ordinance is a permissible regulation of the time, place, and manner of speech, and thus does not abridge freedom of speech under the California Constitution.

Eight decisions of other jurisdictions, filed after the United States Supreme Court first ruled that commercial speech is protected under the First Amendment, have each held that laws prohibiting commercial off-site billboards do not impair freedom of speech. (See cases cited p. —, *ante*.) The opinion of Judge Gignoux in *John Donnelly & Sons* v. *Maller, supra*, presents a comprehensive exposition of the validity of such laws as regulations of the time, place, or manner of speech. That opinion points out that an ordinance which regulates commercial speech will pass constitutional inspection as a lawful regulation of the time, place, and manner of speech if it satisfies three criteria: "the restriction on speech must be 'justified without reference to the content of the regulated speech,' (2) the restriction must 'serve a significant governmental interest,' and (3) in so doing, the restriction must 'leave open ample alternative channels for communication of the information.'" (*John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272, 1277, citing *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. 85 and *Va. Pharmacy Bd.* v. *Va. Consumer Council, supra*, 425 U.S. 748.) The San Diego ordinance complies with these requirements.

First, the instant ordinance does not seek to suppress the content of the advertiser's message. Each of the high court decisions on which plaintiffs rely struck down laws aimed at the suppression of a particular message based on the content of that message. *Bigelow* invalidated a law prohibiting advertising which explained how to obtain an abortion; *Virginia Pharmacy Board* invalidated a law banning advertisement of drug prices; *Linmark* invalidated an ordinance banning residential "for sale" and "sold" signs; *Bates* invalidated a state bar rule against attorney advertising. Ordinance No. 10795, by way of contrast, was not enacted to prevent an advertiser from communicating his message to the public, but only to bar him from using a particularly unsightly and intrusive mode of communication.

Second, as we have already explained, the ordinance serves significant governmental interests—promoting traffic safety and improving the appearance of the community—unrelated to the suppression of free expression. (Cf. *United States* v. *O'Brien* (1968) 391 U.S. 367, 377 [20 L.Ed.2d 672, 680, 88 S.Ct. 1673].)

Finally, the ordinance leaves open adequate alternative means of communication. In upholding a Maine statute which imposed a statewide ban on off-site commercial billboards, the federal district court observed that the act "leaves open ample alternative channels for

communication of the information now carried by off-premise outdoor advertising. . . . Many, if not all, of the commercial messages displayed on off-premise signs can be conveyed to the traveling public through on-premise advertising, official business directional signs, and tourist information centers and publications, all of which are sanctioned by the Act. . . . Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether . . . ." (*John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272, 1279-1280.)

The New York Court of Appeals, sustaining a community ordinance which prohibited all off-site billboards, reached the same conclusion: "Although prohibiting non-accessory billboards, the ordinance permits the maintenance of accessory or on-premise billboards, thus providing an operative means of advertising." (*Suffolk Outdoor Advertising Co.* v. *Hulse, supra*, 43 N.Y.2d 483, 490.) "Since the challenged ordinance . . . regulates only the place and manner in which billboards may be maintained, we conclude that [it] does not infringe the right to free speech guaranteed by the First Amendment." (*Id.*, at p. 489.)

The foregoing decisions properly hold that a community ordinance prohibiting off-site commercial billboards leaves open adequate alternative means of communication. Advertisers of consumer products and services can communicate through newspapers, magazines, radio, and television. Local business can in addition employ on-site billboards. The relatively few noncommercial advertisers who would be restricted by the San Diego ordinance also possess a great variety of alternative means of communication, including some methods, such as leafleting, which are not more expensive than billboards.[14] The San Diego ordinance is not unique; over 100 cities and towns in California and the entire States of Hawaii, Maine, and Vermont have banned off-site billboards; advertisers in such areas make use of other means of communicating with the public.

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[14]Plaintiffs call attention to stipulation No. 28, which states in part that "Many businesses, politicians, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*. In the present litigation, which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message.

In arguing that the San Diego ordinance cannot be sustained as a regulation of time, place, and manner, plaintiffs cite to cases involving leaflets, sound trucks, newspapers, maps, and other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest.[15] We do not find those cases controlling here. Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

We find support for our conclusion that the city's interest in regulating the commercial use of property justifies the instant ordinance in the decision of the United States Supreme Court in *Young* v. *American Mini Theaters* (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440]. Upholding a zoning ordinance which prohibited adult theaters within 500 feet of residential areas or 1,000 feet of other adult establishments, the court held that the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First Amendment values. (See 427 U.S. at p. 63 [49 L.Ed.2d at pp. 321-322]; *id.*, at p. 76, 84 [49 L.Ed.2d at pp. 329-330, 334] (Powell, J., conc.).) Rejecting the contention that the challenged ordinance abridged freedom of speech, *Young* reiterated the principle that commercial speech acquires only a lesser degree of constitutional protection.[16] Significantly the court, to illustrate that principle, cited several examples of valid regulation of commercial speech, among which was the proposition that "A state statute may permit highway billboards to advertise businesses located in the neighborhood but not

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[15]See *Schneider* v. *State* (1939) 308 U.S. 147 [84 L.Ed. 155, 60 S.Ct. 146] (leaflets); *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497 [134 Cal.Rptr. 668, 556 P.2d 1119] (roadside sale of maps); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276 [29 Cal.Rptr. 1, 379 P.2d 481] (soundtrucks); *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294 [138 Cal.Rptr. 53, 562 P.2d 1302] (newsracks).

[16]In *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447 [56 L.Ed.2d 444, 98 S.Ct. 1912] the Supreme Court summarized the limited constitutional protection given commercial speech: "We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . [W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." (436 U.S. at pp. 455-456 [56 L.Ed.2d at pp. 452-454].)

elsewhere." (427 U.S. at p. 68 [49 L.Ed.2d at p. 325], citing the court's dismissal of the appeal in *Markham Advertising Co.* v. *State, supra*, 73 Wn.2d 405, app. dis., 393 U.S. 316 [21 L.Ed.2d 512, 89 S.Ct. 553].)[17]

The New York Court of Appeals also supports our distinction between billboards and other media. In 1976 that court held unconstitutional an ordinance which prohibited all commercial handbills. (*People* v. *Remeny* (1976) 40 N.Y.2d 527 [387 N.Y.S.2d 415, 355 N.E.2d 375].) One year later, however, the court upheld an ordinance which prohibited all off-site billboards as a permissible regulation of the time, place, and manner of speech. (*Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra*, 43 N.Y.2d 483.)

In summary, San Diego asserts a strong interest in removing commercial off-site billboards to enhance the appearance of the community and to improve traffic safety. To further those ends, the city enacted a zoning ordinance which does not seek to suppress the content of the advertising messages, but only to prohibit one means by which such messages are placed before the public. A multitude of published decisions support the proposition that such an ordinance does not abridge freedom of speech. Finding that the recent commercial speech cases of the United States Supreme Court do not undermine those decisions, and that billboards, as permanent intrusive uses of land, may reasonably be distinguished from other media, we conclude that the San Diego ordinance does not on its face abridge freedom of speech under either the United States or California Constitutions.

4. (4a) ***The San Diego ordinance is preempted by the Outdoor Advertising Act to the extent that the ordinance requires removal without compensation of billboards within 660 feet of federal interstate and primary highways.***

Plaintiffs contend that the summary judgment below should be sustained on the ground that Ordinance No. 10795 is preempted by provisions of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). Plaintiffs rely on two provisions: Section 5226, which states

[17]The Maryland Court of Appeals, sustaining a ban on billboards in the Oldtown urban renewal district of Baltimore, relied squarely on the Supreme Court decision in *Young* v. *American Mini Theaters*. (*Donnelly Advertising Corp.* v. *City of Baltimore, supra*, 370 A.2d 1127, 1132.)

generally the legislative policy and findings underlying the Outdoor Advertising Act, and section 5412, which requires payment of compensation for removal of billboards when such compensation is necessary to protect the state's share of federal highways funds.

Section 5226 reads as follows: "The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

The significance of section 5226 is not clear. The section states broad policy objectives but neither expressly authorizes billboards in business areas nor explicitly limits the authority of municipalities to prohibit billboards in such areas. Although the findings of section 5226 could be read literally to authorize maintenance of billboards in commercial areas despite any contrary local prohibition[18] such an interpretation apparently conflicts with section 5229, which provides that "The provisions of this chapter shall not be construed to permit a person to place or maintain in existence . . . any outdoor advertising prohibited by . . . any ordinance of any city . . . ." Section 5230 further confirms the authority of a city under the police power; it states that "The governing body of any city, county, or city and county may enact ordinances, including, but not limited to, land use or zoning ordinances, imposing

[18] If section 5226 were construed to authorize billboards in commercial areas of cities, including locations not adjacent to state or interstate highways, it might be invalid as a regulation of a municipal affair. (See *Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63 [81 Cal.Rptr. 465, 460 P.2d 137].)

restrictions on advertising displays adjacent to any street, road, or highway equal to or greater than those imposed by this chapter."[19]

Viewed in context, section 5226 appears to be a statement of policy, adopted to explain why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays adjacent to state and interstate highways in noncommercial areas, but not for the prohibition of such displays within business areas. The section does not constitute a substantive limitation on the police power of the municipality, and thus should not be construed to preempt municipal authority.

Section 5412, the other provision on which plaintiffs rest their preemption argument, does serve to preempt the San Diego ordinance to a limited extent. Section 5412 provides that: "If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power."[20] As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.* (See 55 Ops.Cal.Atty.Gen. 1 (1972). Analysis of the alleged preemptive effect of section 5412, consequently, requires a review of the provisions of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701).

Subsection (b) of the act provides for a 10 percent cut in federal-aid highway funds to any state which fails to provide effective control of outdoor advertising signs, displays, and devices which fall in either of two categories: (1) signs "within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way [of]

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[19]Further lack of clarity arises from the language of section 5227, which states that "It is the intention of the Legislature to occupy the whole field of regulation by the provisions of this chapter except that nothing in this chapter prohibits . . . the passage by any county of reasonable land use or zoning regulations affecting the placing of advertising displays . . . ." If this language is intended to grant only counties, and not cities, authority to regulate advertising by zoning, it is inconsistent with section 5230.

[20]The quoted language is the text of section 5412 as enacted in 1975. The language of prior section 5412 (enacted in 1970), and of prior section 5288.3a (enacted in 1967 and repealed by the enactment of § 5412) does not differ from the present section in any respect material to the instant case.

the Interstate System and the primary system [of federal highways]," and (2) "those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way."[21] Since all signs at issue in this litigation are located within urban areas, we are concerned only with the first category—signs within 660 feet of federal primary or interstate highways.

Under subsection (c), "effective control" of outdoor advertising signs requires that all signs within 660 feet of federal interstate and primary highways must be removed except for official and directional signs, signs advertising property for sale or lease, on-site advertising, landmark signs, and signs advertising free coffee.[22]

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[21]Subsection (b) reads in full as follows: "(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State."

[22]Subsection (c) reads as follows: "(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2)

Subsection (d), however, provides that a state may agree with the Secretary of Transportation to permit signs whose size, lighting, and spacing are consistent with customary usage in areas zoned commercial or industrial; although subsection (d) is not explicit on the point, its apparent purpose is to permit signs in commercial and industrial areas which absent agreement would be prohibited by subsection (c).[23]

Pursuant to subsection (d), the State of California entered into an agreement in 1968 with the Secretary of Transportation to permit billboards, subject to restrictions on size, spacing, and similar matters, in commercial and industrial zones of all California cities. The agreement, however, contains a caveat: "Nothing contained herein shall be construed to abrogate or prohibit the State or any subdivision of the State from exercising a greater degree of control of outdoor advertising signs, displays and devices than that required by the Act or from adopting standards which are more restrictive in controlling outdoor advertising signs, displays and devices than the provisions of this Agreement." Hence the agreement itself does not prevent San Diego from prohibiting commercial off-site billboards; in effect, the state has elected to protect such billboards under a subsection (d) agreement only when communi-

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signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term 'free coffee' shall include coffee for which a donation may be made, but is not required."

[23]Subsection (d) reads as follows: "(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section."

ties within the state do not prohibit those billboards under the local police power. In 1972, by enacting the ordinance at issue in this litigation, San Diego exercised its power under this caveat and prohibited off-site commercial billboards in areas of the city zoned for commerce or industry.

Finally, we come to subsection (g), the language of which is crucial to the determination of this appeal. That subsection, as amended in 1978, provides that "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section."[24]

Some of the billboards banned by the San Diego ordinance stand within 660 feet of federal interstate or primary highways. Since these are ordinary advertising billboards, not official signs, landmark signs, or other signs exempt from removal under the act, subsection (c) of the act required their removal. The 1968 agreement between the state and the Secretary of Transportation, however, permitted those billboards to remain standing unless a subdivision of the state adopted more restrictive standards. As we have stated, in 1972, San Diego enacted more restrictive standards by prohibiting off-site commercial billboards, thereby depriving those billboards of the protection of the 1968 agreement. The question therefore arises whether just compensation must be paid upon the removal of billboards previously saved from removal by an agreement between the state and the Secretary of Transportation, but which no longer fall within the protective scope of that agreement.

In our opinion compensation is required. Subsection (g) of the Highway Beautification Act, as amended in 1978, requires compensation upon removal of any billboard "not permitted under subsection (c)." The only billboards permitted under subsection (c) are official signs, on-site advertising, and like exempt signs; the billboards in question do not fall within any of the exemptions and are therefore billboards "not permitted under subsection (c)." Under the literal language of the act, the fact that these billboards were previously protected by an agreement

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[24]The balance of subsection (g) specifies that "The Federal Share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

between the state and the Secretary of Transportation, an agreement authorized by subsection (d) of the act, has no bearing upon the fact that they are billboards "not permitted under subsection (c)." The literal language of the federal act therefore compels compensation.

This conclusion finds support in the legislative history of the 1978 amendment which added the phrase "not permitted under subsection (c)" to subsection (g) of the act. The Report of the House Committee on Public Works and Transportation indicated that whenever a state or local government did not exercise its option to enter into an agreement with the Secretary of Transportation to protect signs in commercial and industrial areas, then no distinction could be drawn between signs which could be protected by agreement under subsection (d) and those which could not; "all of the signs are nonconforming with the 'effective control' requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal.... [J]ust compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c)." (Rep., No. 95-1485, p. 16.)

We have carefully considered the decision of the Washington Supreme Court in *Ackerley Communications, Inc.* v. *City of Seattle, supra*, 602 P.2d 1177. Denying compensation for removal of signs within commercial and industrial zones, *Ackerley* stated that "[s]ince signs within commercial and industrial zones which are not governed by an agreement between the State and the Department of Transportation are not regulated by, and are wholly outside the scope of, the federal statute, the only reasonable interpretation of the statutory language is that it does not require compensation for such signs." (602 P.2d at p. 1184.) We must respectfully disagree with the analysis of *Ackerley*. In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement —specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently, it requires compensation when those signs are removed.[25]

[25]The City of San Diego, seconded by the City of Alameda as amicus, advance an argument similar to the *Ackerley* opinion. They contend that subsection (d) of the act and agreements between the state and the Secretary of Transportation pursuant to that subsection impliedly amend and limit the scope of subsection (c). The phrase "not permitted under subsection (c)," they contend, refers only to signs which are both barred by the express language of subsection (c)—that is, signs which are neither official signs, landmarks, or the like—*and* which could not have been protected from removal

The city argues that under the wording of subsection (g) prior to the 1978 amendments, compensation was not required for removal of any sign which constituted a nonconforming use under local zoning[26] (see *Lubbock Poster Co.* v. *City of Lubbock, supra*, 569 S.W.2d 935, 945), and urges that we should not give the 1978 amendments retrospective effect. The Federal Highway Administration, however, takes the position that the 1978 amendments apply to require compensation for "signs still in existence on November 6, 1978, and those additional signs which were removed prior to November 6, 1978, but were the subject of litigation pending on that date." (Memo. Fed. Highway Administrator, Mar. 6, 1979.) (5) Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act, its interpretation of the act merits great weight. (See, e.g., *Northern Ind. Pub. Serv. Co.* v. *Walton League* (1975) 423 U.S. 12, 15 [46 L.Ed.2d 156, 159, 96 S.Ct. 172]; *Los Angeles* v. *Public Utilities Com.* (1975) 15 Cal.3d 680, 696 [125 Cal.Rptr. 779, 542 P.2d 1371].) Mindful of that interpretation, and of the risk that this state might lose substantial funds if we were to adopt a construction contrary to that of the federal administration, we conclude that the amended act applies to billboards in existence or removed subject to litigation as of November 6, the effective date of the amendments.

(4b) We believe that the Highway Beautification Act as amended requires the payment of compensation for removal of all billboards existing or subject to litigation on November 6, 1978, located within 660 feet of federal interstate or primary highways within San Diego and visible from the main traveled way of such highways. We reach that conclusion reluctantly, since its effect in this case and in future cases will probably frustrate the original intent of the Highway Beautification

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by a subsection (c) agreement. In other words, they maintain that compensation is required only when the act *as a whole* compels the removal of a sign, and since the act permits signs in commercial and industrial areas which conform to a subdivision (c) agreement, compensation is not required when a local ordinance requires the removal of such signs.

We appreciate the policy arguments in favor of limiting the requirement of compensation to cases in which the act as a whole compels removal of the billboard. The cities' proffered construction of the amended act, however, cannot be reconciled with the language of the amended act and the legislative history of the amendments.

[26]Before 1978 subsection (g) required compensation upon removal of signs "lawfully in existence on the date of enactment of this subsection. . . [or] lawfully erected on or after January 1, 1968." The chief counsel of the Federal Highway Administration interpreted that ambiguous language to signify that when a sign became a nonconforming use it ceased to be lawfully erected, and thus no compensation was required for its removal. Following the 1978 amendment the Federal Highway Administration withdrew that opinion.

Act: to accelerate the removal of billboards and thereby "promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C. § 131(a).)[27]

The 1978 amendments have, in effect, inverted the purpose of the act, making the secondary goal of ensuring compensation dominant over the primary goal of encouraging billboard removal. (See Steif, *The Billboards are Back* (June 1979) The Progressive, at p. 44.) Nevertheless, the language and administrative construction of the amended act clearly compel compensation, and local removal of billboards without compensation, even though undertaken to promote public safety and preserve natural beauty, would imperil the state's receipt of federal highway funds.

As we noted earlier, section 5412 of California's Outdoor Advertising Act sought to preempt local police power authority and to require payment of compensation when such preemption was necessary to protect California's receipt of federal highway funds. The City of San Diego contends that the regulation and removal of billboards is a municipal affair and that the Legislature thus may not constitutionally enact legislation which preempts local regulatory power. (See generally *Bishop* v. *City of San Jose, supra*, 1 Cal.3d 56, 62-63.) We note, however, that receipt of federal highway funds is a matter of statewide concern; consequently local regulation and removal of billboards, to the extent that it endangers such receipt, becomes also a matter of statewide concern. The courts have recognized that municipal action which affects persons outside of the municipality becomes to that extent a matter which the state is empowered to prohibit or regulate (*CEEED* v. *California*

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[27]In opposing the 1978 amendment to the Highway Beautification Act, the chief counsel for the Federal Highway Administration stated that: "The proposed amendment will have the effect of severely limiting local prerogatives to control outdoor advertising by turning the Highway Beautification Act into a statute which protects signs from local land use decisions and ensuring compensation, irrespective of the reason for removal. This would represent an unprecedented limitation on local zoning authorities. Traditionally, localities have controlled outdoor advertising, along with other types of nonconforming land uses, under the police power, which would allow removal by amortization."

Subsequent to enactment of the amendments, the administration declined to budget funds for the highway beautification program. It explained to Congress that "in light of recently enacted legislation that drastically reduces the scope of the highway beautification program, the budget does not request any funds for this purpose pending completion of a comprehensive Department of Transportation review of the program to determine if it can be successfully continued." (Budget U.S. Gov., Fiscal Year 1980, p. 184.) Congress, however, voted to appropriate $25 million to continue the program for 1980. (Pub. L. No. 96-131, enacted Nov. 30, 1979.)

Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306, 321 [118 Cal.Rptr. 315] and cases there cited); the action of San Diego in that it affects the receipt of federal funds by the state or other California communities falls within that principle.

Accordingly we conclude that San Diego Ordinance No. 10795, to the extent that it permits the removal without compensation of billboards for which compensation is required under title 23, section 131 of the United States Code, is preempted by the California Outdoor Advertising Act, and hence invalid.[28] The application of Ordinance No. 10795 to billboards not protected by federal law—that is, to billboards more than 660 feet from federal interstate or primary highways, or billboards not in existence or removed subject to litigation on November 6, 1978—is not preempted by the Outdoor Advertising Act. The ordinance's proscription upon erection of future billboards is likewise unaffected by the federal requirement for just compensation and thus not preempted by state law.

5. *The San Diego ordinance does not deny plaintiffs the equal protection of the laws.*

(6a) We reject plaintiffs' contention that the city's failure to pay compensation for the removal of all of their billboards, in light of the requirement for compensation to owners of billboards within the preemptive scope of the Outdoor Advertising Act, denies the equal protection of the laws. Since the distinction involves purely economic regulation it may be sustained if the classification bears a rational relationship to a legitimate state purpose. (*People* ex rel. *Dept. of Transportation* v. *Desert Outdoor Advertising, Inc.* (1977) 68 Cal. App.3d 440, 450 [137 Cal.Rptr. 221].)

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[28]The City of San Diego argues that "it is to be seriously questioned whether a Federal Act which purportedly is intended to provide 'effective control' and removal of billboards, but which in actuality, due to lack of funding to pay for removal, results in *protection* of billboards, can, without violating the Tenth Amendment of the United States Constitution, prevent use of local police powers under penalty of withholding federal monies." So long as federal funds are available, the Highway Beautification Act's program for a federal-state partnership in removing billboards visible from federal highways clearly presents no substantial issue under the Tenth Amendment. Since the record before us does not indicate that the federal government would not provide whatever funds are needed to pay its 75 percent share for the removal of billboards within 660 feet of federal highways in San Diego, we need not reach the issues that might be posed by federal regulation in the absence of funding. As noted in footnote 27, *ante*, Congress appropriated $25 million for carrying out the highway beautification program for fiscal year 1980.

(7) California decisions establish that a city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period. (See *Livingston Rock etc. Co.* v. *County of L.A.* (1954) 43 Cal.2d 121, 127 [272 P.2d 4].) (6b) The choice between the alternative largely involves budgetary considerations. The state has chosen to require compensation when the funds for such purpose are augmented by a 75 percent federal contribution. When such federal funds are not available, the state has not required compensation, and the city has accordingly chosen the more economical alternative of requiring abatement after expiration of an amortization period. We find no denial of equal protection in that decision. (See *Ackerley Communications, Inc.* v. *City of Seattle, supra*, 602 P.2d 1177, 1187.)

6. (8a) *The summary judgment cannot be sustained on the ground that the amortization period prescribed by the ordinance as applied to all or any of plaintiffs' signs is unreasonably short.*

The San Diego ordinance requires abatement of all off-site billboards following expiration of an amortization period. That period is computed in the following manner: First, the owner determines the original cost of the sign, including the cost of installation. Second, he deducts 10 percent of that cost for each year the sign has been standing prior to the effective date of the ordinance, arriving at a figure which the ordinance refers to as "the adjusted market value." The ordinance then provides an abatement schedule ranging from one year for signs with an "adjusted market value" of less than $500 to four years for signs with an "adjusted market value" in excess of $20,000.[29]

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[29]The ordinance was enacted March 14, 1972. It provides the following abatement schedule:

"Adjusted Market Value			Abatement Date
Less than	$	500.00	April 1, 1973
$ 500.00	to	999.99	July 1, 1973
1,000.00	to	1,499.99	October 1, 1973
1,500.00	to	1,999.99	January 1, 1974
2,000.00	to	2,999.99	April 1, 1974
3,000.00	to	3,999.99	July 1, 1974
4,000.00	to	4,999.99	October 1, 1974
5,000.00	to	7,499.99	January 1, 1975

Finally, the ordinance states that notwithstanding the abatement schedule in the ordinance, any signs located within 500 feet of freeways or scenic highways must be removed within 90 days. This provision is based on the fact that such signs were rendered nonconforming uses by prior city zoning ordinances. Since those prior ordinances had been in force for about 3 years before the effective date of Ordinance No. 10795, the signs in question received an actual amortization period of at least 3 years and 90 days.

Thus the amortization period under the ordinance depends upon the conformity of the signs under prior ordinances, the original cost of the signs, and the time elapsed since erection of the signs. As the parties stipulated, the abatement schedule is not computed on the basis of current fair market value, useful life, or income generated by the signs. Relying on that stipulation, plaintiffs contend that the amortization period is unreasonable on its face and hence that the ordinance, to the extent that it requires removal of billboards without compensation or a reasonable amortization period, denies due process of law. The trial court in its memorandum opinion granting the motion for summary judgment found that plaintiffs had not provided sufficient proof that the abatement schedule was unreasonable as applied to their billboards.

(9) The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. (*National Advertising Co.* v. *County of Monterey* (1970) 1 Cal.3d 875, 878 [83 Cal.Rptr. 577, 464 P.2d 33]; *Livingston Rock etc. Co.* v. *County of Los Angeles, supra*, 43 Cal.2d 121, 127; *City of Los Angeles* v. *Gage* (1954) 127 Cal.App.2d 442, 454-460 [274 P.2d 34].) The determination of the length of a reasonable period of amortization is not merely a matter of accounting. "It is not required that the nonconforming property concerned have no value at the termination date." (*Art Neon Co.* v. *City and County of Denver*, (10th Cir. 1973) 488 F.2d 118, 121.) The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the

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7,500.00 to	9,999.99	April 1, 1975
10,000.00 to	12,499.99	July 1, 1975
12,500.00 to	14,999.99	October 1, 1975
15,000.00 to	19,999.99	January 1, 1976
20,000.00	and over	April 1, 1976."

private loss which removal of the use would entail. (*Hadacheck* v. *Sebastian* (1915) 239 U.S. 394 [60 L.Ed. 348, 36 S.Ct. 143]; *Art Neon Co.* v. *City and County of Denver, supra*, at p. 121; *National Advertising Co.* v. *County of Monterey, supra*, 1 Cal.3d at p. 886 (dis. opn. of Sullivan, J.); *City of La Mesa* v. *Tweed & Gambrell Mill* (1956) 146 Cal.App.2d 762, 770 [304 P.2d 803]; *City of Los Angeles* v. *Gage, supra*, at p. 461; *Modjeska Sign Studios, Inc.* v. *Berle* (1977) 43 N.Y.2d 468 [402 N.Y.S.2d 359, 373 N.E.2d 255].)[30]

In reviewing the constitutionality of an ordinance providing for amortization of nonconforming billboards we held in *National Advertising Co.* v. *County of Monterey, supra*, 1 Cal.3d 875, that a one-year amortization period was unreasonable except as to signs which had been fully depreciated for federal income tax purposes. (*Id.*, p. 880.) Other decisions have also stated that a one-year amortization period is generally unreasonable (*National Advertising Co.* v. *County of Monterey, supra*, 211 Cal.App.2d 375, 381; *City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188, 195-196 [11 Cal.Rptr. 57]), but have upheld amortization periods ranging from two years and eight months (*People* ex rel. *Dept. Pub. Wks.* v. *Adco Advertisers* (1973) 35 Cal.App.3d 507, 513 [110 Cal.Rptr. 849]), to three years (*City of Escondido* v. *Desert Outdoor Advertising, Inc., supra*, 8 Cal.3d 785; *Naegele Outdoor Adv. Co.* v. *Village of Minnetonka* (1968) 281 Minn. 492 [162 N.W.2d 206]), to five years (*Art Neon Co.* v. *City and County of Denver, supra*, 488 F.2d 118, 122; *County of Santa Barbara* v. *Purcell, Inc., supra*, 251 Cal.App.2d 169; *E.B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra*, 425 F.2d 1141, 1154). **(8b)** In light of those decisions we conclude that the amortization period provided in the instant ordinance which ranges from one to four years, depending upon the depreciated value of the sign, is not unreasonable on its face.

Our conclusion that the amortization schedule established in the San Diego ordinance is not facially unreasonable does not demonstrate its validity as applied to each of plaintiffs' signs. **(10a)** The reasonableness of an amortization period as applied to each billboard depends in

[30]In determining the reasonableless of the period of amortization a great variety of factors may be relevant. As listed in *Art Neon Co.* v. *City and County of Denver, supra*, 488 F.2d 118, 122, the factors include "The nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes and depreciation for other purposes and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area."

part upon facts peculiar to that structure (see *National Advertising Co.* v. *County of Monterey, supra*, 1 Cal.3d 875, 879, and cases there cited; *Bohannan* v. *City of San Diego* (1973) 30 Cal.App.3d 416, 426 [106 Cal.Rptr. 333]). Such facts include the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.

(8c) Plaintiffs have the burden of proving the invalidity of the amortization period as applied to each of plaintiffs' structures. (See *Art Neon Co.* v. *City and County of Denver, supra*, 488 F.2d 118, 121; *National Advertising Co.* v. *County of Monterey, supra*, 1 Cal.3d 875, 879.) On motion for summary judgment plaintiffs did not attempt to meet this burden as to each structure, but limited their argument to the claim that the abatement schedule was facially unconstitutional because it was not based upon the fair market value or remaining useful life of the billboard. **(10b)** But even though the fair market value and remaining useful life are relevant considerations—they are among the factors which must be evaluated in defining the private loss which is balanced against the public benefit in order to determine the reasonable period of amortization—the failure of the city to base its abatement schedule upon such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact that the city arrived at that period by a formula which did not include every one of the relevant considerations does not render its ordinance unconstitutional.[31]

As we have stated, on their motion for summary judgment plaintiffs did not attempt to prove the amortization period was unreasonable as applied to specific signs, except for those signs located within 500 feet of freeways and scenic highways for which this ordinance prescribed an amortization period of only 90 days. The city explains, however, that such signs were already nonconforming uses pursuant to an ordinance enacted more than three years earlier and consequently that plaintiffs had already enjoyed an amortization period of three years with respect to such signs. Plaintiffs' evidence fails to demonstrate that an amortization period of three years and ninety days is unreasonably short as

[31]Even if the amortization period were found to be unreasonable as to a particular property, that finding would "not invalidate its application to other property or invalidate the ordinance of which it is a part." (*Bohannan* v. *City of San Diego, supra*, 30 Cal.App.3d 416, 426.)

applied to any of the signs in question. We therefore conclude that the summary judgment in favor of plaintiffs cannot be sustained on the ground that the amortization period of the ordinance is unreasonable as to all or any of plaintiffs' billboards.

7. (11) *The summary judgment cannot be sustained on the ground that the City Council of San Diego failed to comply with the California Environmental Quality Act.*

Plaintiffs contend that Ordinance No. 10795 is invalid because the city council failed before enacting that ordinance to prepare an environmental impact report as required by Public Resources Code section 21151. Plaintiffs' complaints, however, do not allege the city's noncompliance with the requirements of the California Environmental Quality Act, and although over three years elapsed between the filing of those complaints and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. On motion for summary judgment the pleadings define the issues; thus "'[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.'" (*Krupp* v. *Mullen* (1953) 120 Cal.App.2d 53, 57 [260 P.2d 629]; *Gardenswartz* v. *Equitable etc. Soc.* (1937) 23 Cal.App.2d Supp. 745, 752 [68 P.2d 322]; see *Dawson* v. *Rash* (1958) 160 Cal.App.2d 154, 161 [324 P.2d 959].) The issue of the city's alleged noncompliance with the California Environmental Quality Act therefore was not properly before the trial court on the motion for summary judgment, and thus cannot be asserted here as a ground for sustaining that judgment.

8. *Conclusion.*

In summary, we conclude that neither the federal nor the state Constitution bars a municipality from enacting a zoning ordinance which prohibits off-site billboards and requires removal of existing billboards after expiration of a reasonable amortization period. The Outdoor Advertising Act, however, preempts local law to bar the uncompensated removal of existing billboards located within 660 feet of federal interstate or primary highways. Plaintiffs accordingly may avoid uncompensated removal for any billboards falling within the preemptive scope of the Outdoor Advertising Act; plaintiffs also retain the right to show that the amortization period prescribed by the San Diego ordinance is unreasonably short as applied to some or all of their structures.

Because plaintiffs have failed to demonstrate the invalidity of the ordinance on its face, however, the trial court erred in granting their motion for summary judgment.

To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism. We conclude with the pungent words of Ogden Nash:

"I think that I shall never see

"A billboard lovely as a tree.

"Indeed, unless the billboards fall,

"I'll never see a tree at all."

The judgment is reversed.

Bird, C. J., Mosk, J., and Manuel, J., concurred.

RICHARDSON, J.—I concur in the judgment. I share some of the substantial doubts raised by the dissent of Justice Clark, who discerns serious constitutional difficulties with any governmental scheme calling for the total prohibition of any legitimate business enterprise. Nonetheless, I am persuaded by the majority's analysis that the present ban on off-site billboards meets the minimum constitutional standards established by the United States Supreme Court and that, accordingly, the challenged ordinance must be upheld.

The high court has recently dismissed for want of a substantial federal question an appeal which raised identical issues. In *Suffolk Outdoor Adv.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263], the New York Court of Appeals upheld a local ordinance totally banning all off-site billboards as a rational method of improving community aesthetics. The majority herein correctly observes that the subsequent dismissal of the appeal to the United States Supreme Court must be regarded as a dispositive decision on the merits. (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-344 [45 L.Ed.2d 223, 235-236, 95 S.Ct. 2281].) No convincing basis appears for distinguishing *Suffolk*. Accordingly, I agree with the judgment of reversal.

NEWMAN, J., Concurring.—I share Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal. Unlike both of them, however, I believe that we must examine carefully the state as well as the federal Constitution.

Article I, section 2 of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

That second sentence is imperative. By no means does it imply that federal precedents confine freedom of expression in this state. (See art. I, § 24: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658 [119 Cal.Rptr. 468, 532 P.2d 116] ("A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee. . ."); Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.)

Notwithstanding Ogden Nash's poignant dictum (see next-to-last sentence of the majority opinion), I am not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems "particularly unsightly and intrusive" (*ante*, p. 868).

Some limits on time, place, and manner are of course permissible. Yet as the majority suggest (see their fn. 16), other varieties of speech indeed may merit more protection than is accorded "commercial speech". Further, I stress the brief reminder in footnote 14 of the majority opinion that an individual advertiser "retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message." (Cf. the exhibits in Annex A of the amicus brief filed here on Aug. 27, 1979.)

The ordinance here ought to be redrafted. I hope the drafters will not feel too circumscribed by the majority's footnote 2, which purports (with no citation of legislative history) to proscribe signs that "clearly fall within the intendment of the enactment." Those signs are distinguished from "less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard." Then, in order to articu-

late that distinction, a definition in the Revenue and Taxation Code is endorsed somewhat heroically.

I find in the record no evidence that San Diego lawmakers would have adopted or would now adopt that cryptic, tax-based definition. What about hillside displays and cloth or plastic banners, for example, and signs painted on fences and on the walls of warehouses, barns, other buildings: Are they "rigidly assembled sign[s], display[s], or device[s] permanently affixed . . . or permanently attached" within the endorsed definition? Yet they seem to be "outdoor advertising display signs" within the meaning of the ordinance, and many of them would have some permanence. Also, what happens if a large rather than "a small sign placed on one's front yard" announces a political or religious message or a labor dispute? (Cf. the final sentence of the first paragraph in the majority's fn. 2.)

Those kinds of borderline issues do seem solvable, and thus I concur in the reversal of the judgment.

CLARK, J.—I dissent. The San Diego ordinance unconstitutionally prohibits speech protected by the First Amendment. Because the ordinance must be considered a nullity, other issues are not reached.

The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes. (See, Davidson, Propaganda and The American Revolution (U.N.C. Press 1941); Houck, Outdoor Advertising: History and Regulation (U.Notre Dame Press 1969).) The majority today call for absolute prohibition of this expression in violation of the First Amendment. (*Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691]; *Linmark Associates, Inc.* v. *Willingboro* (1977) 431 U.S. 85 [52 L.Ed.2d 155, 97 S.Ct. 1614]; *Va. Pharmacy Bd.* v. *Va. Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817]; *Bigelow* v. *Virginia* (1975) 421 U.S. 809 [44 L.Ed.2d 600, 95 S.Ct. 2222]; *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497 [134 Cal.Rptr. 668, 556 P.2d 1119].)

The briefs before us reveal political, cultural and social messages on San Diego billboards that encourage the 55 mph speed limit and safety seatbelt; protest involvement in the United Nations and Vietnam; blast

rising taxes; condemn assassination of the Israeli delegation to the Munich Olympic Games. All such communication is protected by the First Amendment. Commercial communication may be restricted by government only after considering informational value to the public, adequate alternative means for dissemination, and state interest. (*Va. Pharmacy Bd.* v. *Va. Consumer Council, supra*, 425 U.S. 748, 770 [48 L.Ed.2d 346, 363]; *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456 [56 L.Ed.2d 444, 452-453, 98 S.Ct. 1912].) But the issue before us is not scope of permissible regulation of commercial thought. By written stipulation the parties have agreed on the valuable content of materials displayed on outdoor signs the ordinance would prohibit. The stipulation provides that plaintiffs' signs "are located in areas zoned for commercial and industrial purposes"; that outdoor advertising "produces numerous direct and indirect benefits to the public"; and that "[*v*]*aluable commercial, political and social information is communicated to the public through the use of outdoor advertising.* Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (Joint stipulation of facts Nos. 20, 28, *ante*, p. 857; italics added.) As applied in this case, the ordinance clearly prohibits expression of political, social and commercial thought. The ordinance must therefore satisfy the most stringent rules flowing from the First Amendment.

In spite of the stipulation, and without scrutiny of the effect on protected speech, the majority grandly uphold the San Diego ordinance. The majority's withdrawal from this court's recent and unanimous decision in *Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497, by effectively ignoring it, is particularly significant and distressing.

Under a municipal ordinance not unlike that before us today, the City of Los Angeles prosecuted Mrs. Welton for sidewalk sale of maps revealing the homes of movie stars. When challenged as an invasion of Mrs. Welton's First Amendment rights, the city contended her commercial activity constituted unprotected speech. In holding the ordinance could not be constitutionally applied to Mrs. Welton, we stated: "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth, is constitutionally irrelevant. . . . Mrs. Welton and her maps are entitled to the same First Amendment protection as the political candidate and his political pamphlet." (*Id.*, at p. 504.)

Using both stale and distinguishable cases, the majority attempt to justify the ordinances' blanket prohibition by claiming (1) outdoor signs are not entitled to the same protection as other speech, (2) governmental interests here outweigh any First Amendment interest involved, and (3) "probable" alternative means exist for plaintiffs to communicate public messages.

Cases cited by the majority *predating* recognition of First Amendment protection of commercial speech, upholding zoning ordinances prohibiting off-site billboards, are of no precedential value. Those cases assumed commercial communication lacks First Amendment protection and failed to recognize signs might be used for noncommercial messages. (See, *Markham Advertising Co.* v. *State* (1968) 73 Wn.2d 405, 429 [439 P.2d 248]; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292, 302 [40 A.2d 177]; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263, 270 [279 N.Y.S.2d 22, 225 N.E.2d 749, 21 A.L.R.3d 1212]; *Howard* v. *State Department of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581, 584; *United Advertising Corp.* v. *Burrough of Raritan* (1952) 11 N.J. 144, 152 [93 A.2d 362].)

Further, cases relied on by the majority decided following recognition of First Amendment protection of commercial speech (see, Va. Pharmacy Bd. v. *Va. Consumer Council, supra*, 425 U.S. 748; *Bigelow* v. *Virginia, supra*, 421 U.S. 809) are clearly distinguishable from the case at bench.

Contrary to majority assertion (*ante*, p. 867), *Suffolk Outdoor Adv.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263], does not resolve the issue of whether the San Diego ordinance violates the First Amendment. Examination of *Suffolk* reveals the New York Court of Appeals devoted a scant paragraph to the First Amendment, summarily determining the ordinance in question was not a regulation based on content, and operative alternative means such as accessory or on-premise billboards existed for outdoor advertising. *Suffolk* does not deal with the issue of whether the ordinance curtailed noncommercial thought similar to the communication stipulated to in this case, so does not examine the availability of adequate alternatives. Thus, while of some precedential value on the issue of permissible regulation of commercial ideas, *Suffolk* does not address the critical issue faced by this

court: whether noncommercial as well as commercial speech can be constitutionally restricted in the manner provided in the ordinance.[1]

Other cases relied on by the majority, while upholding banning of billboards, exempt noncommercial messages from the ban. (*John Donnelly & Sons* v. *Mallar* (S.D.Me. 1978) 453 F.Supp. 1272, 1280; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd.* (1975) 369 Mass. 206 [339 N.E.2d 709, 721]; *Newman Signs, Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, 760-762.) Such cases have no precedential value when, as here, the ordinance includes noncommercial thought.

Still other cases relied on by the majority uphold restrictions on billboards because they were banned only in one area but permitted in other areas of the community. (*Connelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660 [370 A.2d 1127, 1132] (urban renewal ordinance banning billboards only in the renewal area of the city); *Lubbock Poster Co.* v. *City of Lubbock* (Tex.Crim.App. 1978) 569 S.W.2d 935, 945 (ordinance did not totally prohibit billboards but rather regulated only the location, size, separation and height); *State* v. *Lotze* (1979) 92 Wn.2d 52 [593 P.2d 811, 813] (Washington State Advertising Control Act prohibited billboards along scenic highways but permitted them in commercial and industrial areas).) In contrast, the San Diego ordinance constitutes a total ban on all off-site billboards anywhere in the City of San Diego.

Billboards Are Entitled to the Same First Amendment Protection as Other Forms of Speech

First Amendment protection extends to virtually all media utilized to disseminate ideas. (*Erznoznik* v. *City of Jacksonville* (1974) 422 U.S. 205 [45 L.Ed.2d 125, 95 S.Ct. 2268] (drive-in movies); *Police Depart-*

[1]The majority view the Supreme Court dismissal of appeal in *Suffolk* as indicating that court's approval of the prohibition of off-site billboards. (*Ante*, p. 867; citing *Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345 [45 L.Ed.2d 223, 235-237, 95 S.Ct. 2281].)

The majority's one-paragraph analysis of *Suffolk* (*ante*, p. 867) based on only a one-line Supreme Court order, itself based on a one-paragraph discussion by the New York Court of Appeals summarily determining there are adequate alternatives while focusing only on advertising alternatives, is not the type of close scrutiny mandated by the First Amendment in limiting speech.

Further, summary dismissals are of only limited precedential value and do not carry the full weight of a Supreme Court ruling after full briefing and argument and certainly do not endorse any matter not considered by the opinion below. (*Washington* v. *Yakima Indian Nation* (1979) 439 U.S. 463, 477, fn. 20 [58 L.Ed.2d 740, 753, 99 S.Ct. 740].)

ment of Chicago v. *Mosley* (1972) 408 U.S. 92 [33 L.Ed.2d 212, 92 S.Ct. 2286] (picketing); *Schneider* v. *State* (1939) 308 U.S. 147 [84 L.Ed. 155, 60 S.Ct. 146] (leafletting); *Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497 (roadside sale of maps); *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77 [112 Cal.Rptr. 777, 520 P.2d 1] (posting signs on public utility poles); *Dillon* v. *Municipal Court* (1971) 4 Cal.3d 860 [94 Cal.Rptr. 777, 484 P.2d 945] (demonstrations and parades); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276 [29 Cal.Rptr. 1, 379 P.2d 481] (sound trucks); *California Newspaper Publishers Assn., Inc.* v. *City of Burbank* (1975) 51 Cal.App.3d 50 [123 Cal.Rptr. 880] (newspaper racks).) "The right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely." (*Wollam* v. *City of Palm Springs, supra*, 59 Cal.2d 276, 284.)

In addressing their first basis in justification of the San Diego ordinance's blanket prohibition—outdoor signs are not entitled to the same protections as other forms of speech—the majority attempt to distinguish outdoor signs from "other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest" (e.g., leafletting, sound trucks, etc.) because an outdoor sign is a "large, immobile and permanent structure" as opposed to "more transitory and less obtrusive media." (*Ante*, p. 870.) Such distinction suffers the same overbreath as the ordinance itself. While the ordinance may seek to prohibit small, unobtrusive *off-site* signs, it permits obtrusive and perhaps even offensive *on-site* billboards. Being equally inconsistent, the majority selectively sustain the prohibition of "offensive" billboards but support the use of sound trucks, picketing, leafletting and demonstrations as constituting "more transitory or less obtrusive media."

Obtrusiveness does not justify total prohibition of protected expression. In *Erznoznik* v. *City of Jacksonville, supra*, 422 U.S. 205, the Supreme Court struck down a city ordinance prohibiting exhibition of a motion picture displaying the bare female body by a drive-in theater whose screen was visible from a public street. Off-site advertising hardly commands the same attention as the "unique type of eye-catching display" of an animated drive-in movie (*id.*, at p. 222 [45 L.Ed.2d at

p. 138]; Burger, C. J., dis.), yet the court noted "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" (*Id.*, at p. 212 [45 L.Ed.2d at p. 132].)

Obtrusiveness is thus measured by not only quality or degree of offensive intrusion, but also by the ability of the offended to avoid it. Is it not fair to assume that a display of animated nudes on a screen constitutes an intrusion of greater degree than a motionless sign or symbol advertising some product? Yet the Supreme Court did not find the nude display so offensive that its effect could not be kept within permissible limits. Off-site displays also are not so offensive that they cannot be kept within reasonable limits.

While obtrusiveness may be a factor to be weighed in the balance in determining whether a restriction is reasonable as to time, place and manner, the majority fail to even attempt a balance. Rather, they use obtrusiveness as a sole reason, a la Ogden Nash, for the blanket ban on billboards.

In instances when obtrusiveness has been deemed a factor justifying billboard regulation, the courts were persuaded by other considerations, such as the discredited view that the Constitution did not protect commercial speech, or that only those billboards next to interstate and state highways should be banned. (*General Outdoor Adv. Co.* v. *Department of Public Wks.* (1935) 289 Mass. 149 [193 N.E. 799, 803-804, 814]; *Markham Advertising Co.* v. *State* (1968) 73 Wn.2d 405, 428-429 [439 P.2d 248].) In this case, obtrusiveness must be balanced against constitutional protection given noncommercial as well as commercial uses of billboards, and the total ban of the San Diego ordinance. These factors compel the conclusion the ordinance is over-broad, constituting an impermissible infringement on First Amendment protections.

Governmental Interests Do Not Justify the Ordinance's Infringement on First Amendment Rights

The majority assert as their second justification for blanket prohibition that the balance must be tilted in favor of governmental interests, resulting in imbalance.

While recognizing that aesthetic beauty and traffic safety are legitimate police power objectives, the majority fail to show these interests

outweigh First Amendment rights of plaintiffs, advertisers and the viewing public.[2] The conflict between police powers on the one hand and First Amendment rights on the other must seek compromise, allowing government to reasonably regulate the time, place and manner in which First Amendment rights may be exercised. (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104 [33 L.Ed.2d 222, 92 S.Ct. 2294]; *Healy* v. *James* (1972) 408 U.S. 169 [33 L.Ed.2d 266, 92 S.Ct. 2338]; *Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497; *Burton* v. *Municipal Court* (1968) 68 Cal.2d 684 [68 Cal.Rptr. 721, 441 P.2d 281]; *Wollam* v. *City of Palm Springs, supra*, 59 Cal.2d 276.) Thus government may validly regulate the use of newsracks (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294 [138 Cal.Rptr. 53, 562 P.2d 1302]), sound trucks (*Kovacs* v. *Cooper* (1949) 336 U.S. 77 [93 L.Ed.513, 69 S.Ct. 448, 10 A.L.R.2d 608]), street sales of goods or merchandise (*Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497), and the operation of "adult" movie theaters (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440]). Similarly, off-site advertising signs may be reasonably regulated.

Notwithstanding the state's power to regulate, such power "does not necessarily sanction the outright prohibition." (*Wollam* v. *City of Palm Springs, supra*, 59 Cal.2d 276, 284.) To be constitutionally reasonable, regulation of time, place or manner must be written narrowly and explicitly, in furtherance of a legitimate police power purpose. (*Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497.) But here the majority push police power objectives so far from center balance as to abolish protected speech. The *absolute prohibition* of off-site signs is justified by neither community appearance nor traffic improvement. Furthermore, the ordinance—written in terms of total prohibition—is not susceptible to interpretation avoiding constitutional infirmity. (See *Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497.)

Further, in support of the conclusion that the city's interest in regulating commercial use of property justifies the instant ordinance the majority mistakenly rely on *Young* v. *American Mini Theatres, supra*, 427 U.S. 50. While upholding a zoning ordinance restricting the location of "adult" theaters, *Young* was careful to observe the First Amendment protection of such communication from total suppression.

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[2]It is well-settled that the right to receive "information of potential interest and value" is protected by the First Amendment. (*Bigelow* v. *Virginia, supra*, 421 U.S. 809, 822 [44 L.Ed.2d 600, 612]; see also, *Stanley* v. *Georgia* (1969) 394 U.S. 557, 564 [22 L.Ed.2d 542, 549, 89 S.Ct. 1243].)

While *Young* affirms the proposition that commercial speech acquires a lesser degree of constitutional protection than other more traditionally protected varieties of thought (*id.*, at p. 68 [49 L.Ed.2d at pp. 324-325]; *Ohralik* v. *Ohio State Bar Assn., supra*, 436 U.S. 447, 455-456 [56 L.Ed.2d 444, 452-453]), the statute was upheld in part because it did not completely ban theaters from the city. Instead, theaters were restricted to areas more than 500 feet beyond residential areas and 1,000 feet beyond other adult establishments. In contrast, the San Diego ordinance bans billboards altogether.

ADEQUATE ALTERNATIVE MEANS OF DISSEMINATION OF SPEECH ARE NOT AVAILABLE

The third purported justification urged by the majority in support of the ordinance—existing "adequate alternative means" for advertisers to communicate their ideas—is likewise without merit. The parties' stipulation establishes that the ordinance will eliminate outdoor advertising, that outdoor advertising benefits the public in numerous ways, and that politicians and others rely on outdoor advertising because other forms of advertising are "insufficient, inappropriate and prohibitively expensive." (See Joint Stipulation of Facts Nos. 20 and 28, *ante*, p. 857.) Thus, in numerous situations, including the delivery of political messages, traditional off-site advertising is the only practical means of communicating.

The majority further rely on *John Donnelly & Sons* v. *Mallar, supra*, 453 F.Supp. 1272, as support for the proposition that alternative means of communicating such as on-premise advertising, official business directional signs, tourist information centers and publications justify the ordinance's prohibition against outdoor advertising. However, *Mallar* is limited to a ban on only *commercial* billboards: "...non-commercial messages such as those conveyed by political, civic and charitable signs, are specifically exempted from the broad ban on off-premises advertising." (*Id.*, at p. 1280.) *Mallar*'s holding that existing alternatives justified a ban on commercial speech, while specifically exempting noncommercial messages from that holding, forecloses any argument that such alternatives would justify a ban on noncommercial messages as proposed by the broad San Diego billboard ban.

Recognizing freedom of speech entails not only communication, but effective communication, courts have refused to impose absolute prohibition of a medium when there exists no practical alternative. In our

recent case of *Welton* v. *City of Los Angeles, supra*, 18 Cal.3d 497, we unanimously invalidated on First Amendment grounds an ordinance banning sidewalk and parkway sales of commercial books, magazines, maps, and other constitutionally protected material despite readily apparent alternative methods of distribution. We noted the "city has failed to demonstrate that such a broad prohibition is necessary to the attainment of a legitimate police power purpose. Its interest in abating public nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available." (*Id.* at pp. 507-508.) In *Wollam* v. *City of Palm Springs, supra*, 59 Cal.2d 276, we held unconstitutional an ordinance prohibiting use of stationary sound trucks where other methods including moving sound trucks were available. Similarly, in *Linmark Associates, Inc.* v. *Willingboro, supra*, 431 U.S. 85, the Supreme Court rejected a contention that because ample alternative methods of communication existed, an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs should be sustained.[3]

There being no basis upon which the absolute prohibition of outdoor advertising can be justified, the judgment should be affirmed.

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[3]The majority's statement that the "possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*" (*ante*, p. 869, fn. 14), ignores both the joint stipulation of facts by which we are bound and traditional First Amendment overbreadth analysis. The parties' stipulation that many advertisers rely exclusively on outdoor advertising provides more than mere "possibility" that communication will be impeded. Furthermore, while the overbreadth doctrine may not apply with the same force in situations involving commercial speech (see *Bates* v. *State Bar of Arizona, supra*, 433 U.S. 350, 380 [53 L.Ed.2d 810, 833]), the instant ordinance affects social and political expressions as well as commercial speech. It is apparent, for instance, that political expression will be significantly curtailed although political campaign posters are authorized. The restriction to temporary signs, less efficient in terms of cost and effectiveness than the prohibited large and permanent display structures whose costs can be depreciated over long periods, will work to the detriment of "the poorly financed causes of little people" (*Martin* v. *Struthers* (1943) 319 U.S. 141, 146 [87 L.Ed. 1313, 1319, 63 S.Ct. 862]), whose proponents are unable to afford other more costly mass media advertising.

[L.A. No. 30782. Mar. 21, 1979.]

METROMEDIA, INCORPORATED, et al.,
Plaintiffs and Respondents, v.
CITY OF SAN DIEGO et al., Defendants and Appellants.

SUMMARY

A metropolitan city enacted an ordinance banning off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin enforcement. The trial court granted plaintiffs' motion for summary judgment, stating the ordinance was invalid as an unreasonable exercise of the police power and an abridgment of constitutional guarantees of freedom of speech and the press. The trial court then entered judgment enjoining enforcement of the ordinance. (Superior Court of San Diego County, Nos. 332881 and 333292, Jack R. Levitt, Judge.)

The Supreme Court reversed and remanded for further proceedings. The court held the achievement of the purposes cited in the ordinance, eliminating traffic hazard and improving the appearance of the city, represented proper objectives for the exercise of the city's police power, and the present ordinance bore a reasonable relationship to those objectives. The court further held that a ban on commercial off-site billboards, enacted under the city's authority to regulate the commercial use of real property, did not abridge freedom of speech or press. The court pointed out the ordinance did not seek to suppress the content of the advertiser's message, served significant governmental interest, and left open adequate alternative means of communication. The court also held that the ordinance was not preempted by the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.), which preempts local ordinances only when they threaten to subject the state to a penalty under the federal Highway Beautification Act; the federal act, however, does not penalize a state merely because a subdivision of the state, acting pursuant to valid zoning ordinances, requires the removal of billboards without compensa-

tion. The court rejected plaintiffs' contention that the city's failure to pay compensation for the removal of their billboards, in light of the state's payment of compensation to owners of billboards removed under Outdoor Advertising Act, denied them equal protection under the laws. The court further held the amortization period provided in the ordinance, which ranged from one to four years depending on depreciated value of the sign, was not unreasonable on its face. However, the court held plaintiffs retained the right to show that the amortization period described in the ordinance was unreasonably short as applied to some or all of their structures. (Opinion by Tobriner, J., with Bird, C. J., Mosk and Manuel, JJ., concurring. Newman, J., concurred in the result. Separate concurring opinion by Richardson, J. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Advertising § 3—Regulation; Police Power—By Counties and Municipalities; Nuisances; Zoning.—A municipal ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, which recited the purpose of the ordinance as elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city, was valid as a proper application of municipal authority over zoning and land use for the purpose of promoting public safety and welfare. As a matter of law, an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety. Moreover, the improvement of the appearance of the community falls within the city's authority under the police power. (Overruling *Varney & Green* v. *Williams* (1909) 155 Cal. 318 [100 P. 867], which held that aesthetic considerations cannot justify the exercise of the police power to prohibit billboards. Also disapproving contrary language in *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785 [106 Cal.Rptr. 172, 505 P.2d 1012]; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 55 Cal.App.2d 765, 769 [63 Cal.Rptr. 543]; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal.App.2d 169, 173 [59 Cal.Rptr. 345]; *Nat. Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375,

379 [27 Cal.Rptr. 136]; and *City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188 [11 Cal.Rptr. 57].)

[See **Cal.Jur.3d,** Advertising, § 4; **Am.Jur.2d,** Advertising, § 4 et seq.]

(2) **Advertising § 3—Regulation; Police Power—By Counties and Municipalities; Nuisances; Zoning—Prohibition of Off-site Billboards.**—A city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, which reasonably related to the public safety and welfare, and which completely prohibited a business not found to be a public nuisance, was not invalid as an excessive exercise of the police power. The validity of the ordinance under the police power did not turn on its regulatory or prohibitory character, nor on the size of the city which enacted it, but solely on whether it reasonably related to the public safety and welfare.

(3) **Constitutional Law § 59—First Amendment and Other Fundamental Rights of Citizens—Governmental Regulation and Restriction of Fundamental Rights—Prohibition of Off-site Billboards.**—A municipal ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, enacted for the purpose of eliminating traffic hazards and improving the appearance of the city, was a proper exercise of the city's authority to regulate the commercial use of real property and did not, on its face, abridge freedom of speech guaranteed by U.S. Const., First Amend. Neither did the ordinance, on its face, violate the free speech clause of Cal. Const., art. I, § 2, where the ordinance did not seek to suppress the content of the advertiser's message, served significant governmental interests (promoting traffic safety and improving the appearance of the community) unrelated to the suppression of free expression, and where the ordinance left open adequate alternative means of communication. Thus the ordinance was a permissible regulation of the time, place, and manner of speech.

(4) **Advertising § 4—Regulation; Police Power—Outdoor Advertising Act—Preemption.**—A city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period was not preempted by a provision of the Outdoor Advertising Act (Bus. & Prof. Code, § 5266) stating the Legislature's finding that outdoor advertising is a

legitimate use of property and should be allowed to exist in business areas, subject to reasonable controls in the public interest. In view of other provisions of the act confirming the power of cities to restrict billboards, the provision does not constitute a substantive limitation on the police power of the municipality, but merely explains why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays adjacent to state and interstate highways and noncommercial areas, but not for the elimination of such displays within business areas.

(5a, 5b) **Advertising § 4—Regulation; Police Power—Outdoor Advertising Act—Preemption—Federal Law.**—A city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, was not preempted by a provision of the Outdoor Advertising Act (Bus. & Prof. Code, § 5226) which requires payment of compensation for removal of billboards when such payment is necessary to comply with the Highway Beautification Act of 1965 (23 U.S.C. § 131). The Outdoor Advertising Act preempts local ordinances only when those ordinances threaten to subject the state to a penalty under the federal act, but that act does not penalize the state where a subdivision of the state, acting pursuant to valid zoning ordinances, require the removal of billboards without compensation.

(6) **Statutes § 44—Construction—Aids—Contemporaneous Administrative Construction.**—Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act of 1965 (23 U.S.C. § 131), its interpretation of the act is entitled to great weight and, if reasonable, should be sustained.

(7a, 7b) **Constitutional Law § 89—Equal Protection—Classification—Essential and Nonessential Characteristics—Reasonableness of Classification in Light of Legislative Purpose—Removal of Billboards—Compensation.**—Under a city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, the city's failure to pay compensation for the removal of billboards did not deny the owners thereof equal protection of the laws, even though the state paid compensation to owners of billboards removed under the Outdoor Advertising Act. Since the distinction involves purely economic regulation it may be sustained if the classification bears a rational relationship to a legitimate state purpose. Thus, since state

funds were augmented by a 75 percent federal contribution it could reasonably choose to pay compensation and thus eliminate billboards without concern for any amortization period, while the city, lacking such federally financed funds, could reasonably choose the more economical alternative of requiring abatement only after expiration of an amortization period.

(8) **Zoning and Planning § 21—Elimination of Nonconforming Uses.**—A city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period.

(9a-9c) **Zoning and Planning § 21—Elimination of Nonconforming Uses —Amortization Period.**—In an action by owners of billboards to enjoin the enforcement of a city ordinance banning all off-site advertising billboards and requiring the removal of existing billboards following expiration of an amortization period, summary judgment for plaintiffs on the ground that the amortization period prescribed by the ordinance as applied to all or any of plaintiffs' signs were unreasonably short, could not be sustained. The amortization period, which ranged from one to four years depending upon the depreciated value of the sign, was not unreasonable on its face. Moreover, plaintiffs had the burden of proving the invalidity of the amortization period as applied to each structure, but on motion for summary judgment plaintiffs did not attempt to meet the burden as to each structure, but only claimed the abatement schedule was facially unconstitutional as not being based on the fair market value or remaining useful life of the billboards.

(10) **Zoning and Planning § 21—Elimination of Nonconforming Uses—Amortization Period.**—Zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. The determination of the length of a reasonable period of amortization is not merely a matter of accounting. The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail. Relevant factors include the nature of the nonconforming use, the character of the structure, the location, what part of

the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes and depreciation for other purposes and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area.

(11a, 11b) **Zoning and Planning § 21—Nonconforming Uses—Elimination of Nonconforming Uses—Amortization Period—Billboards.**—The reasonableness of an amortization period as applied to each billboard where removal was required pursuant to a city ordinance depended in part upon facts peculiar to that structure, including the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period. However, even though the fair market value and remaining useful life are relevant considerations, the failure of the city to base its abatement schedule on such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact the city arrived at that period by a formula which did not include every one of the relevant considerations does not render the ordinance unconstitutional.

(12) **Summary Judgment § 27—Appellate Review—Presenting and Reserving Objections.**—In an action by billboard owners to enjoin enforcement of an ordinance banning all off-site advertising billboards, summary judgment in their favor could not be sustained on the ground the city council failed to comply with the California Environmental Quality Act in enacting the ordinance, where plaintiffs complaint did not allege such noncompliance, and where, although over three years elapsed between the filing of the complaint and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. Accordingly, the issue of the city's alleged noncompliance with the act was not properly before the trial court on the motion for summary judgment, and could not be asserted on appeal as a ground for sustaining that judgment.

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OPINION

TOBRINER, J.—The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin its enforcement. Upon motion for summary judgment, the superior court adjudged the ordinance unconstitutional, and issued the injunction as prayed.

We reject the superior court's conclusion that the ordinance exceeded the city's authority under the police power. We hold that the achievement of the purposes recited in the ordinance—eliminating traffic hazards and improving the appearance of the city—represent proper objectives for the exercise of the city's police power, and that the present ordinance bears a reasonable relationship to those objectives. We reject also the lower court's alternative holding that the ordinance violates the First Amendment; judicial decisions demonstrate that a ban on commercial off-site

billboards, enacted under the city's authority to regulate the commercial use of real property, does not abridge freedom of speech or press.

Plaintiffs urge that we sustain the summary judgment on a variety of other grounds: they contend that the ordinance is preempted by the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.); that it will endanger the state's share of federal highway funds; that it denies them the equal protection of the law; that its amortization provisions are facially unreasonable; and that the city failed to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). For the reasons we shall set forth in the body of this opinion, we conclude that none of these grounds will suffice to sustain the judgment below. We conclude that the judgment of the superior court should be reversed, and the case remanded to that court for further proceedings.

1. *Summary of proceedings in the trial court.*

The present case concerns the constitutionality of San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. With limited exceptions specified in the footnote,[1] the ordinance as subsequently amended prohibits all off-site "outdoor advertising display signs."[2] Off-site signs are defined as those which do not identify a use, facility or service located on the premises or a product which is produced, sold or manufactured on the premises. All existing signs which do not conform to the requirements of the ordinance must be removed following expiration of an amortization period, ranging from 90 days to 4 years depending upon the location and depreciated value of the sign.

[1]The original ordinance permitted the following off-site signs: Signs maintained in the discharge of a governmental function; bench advertising signs; commemorative plaques, religious symbols, holiday decorations and similar such signs; signs located within shopping malls not visible from any point on the boundary of the premises; signs designating premises for sale, rent or lease; public service signs depicting time, temperature or news; signs on vehicles conforming to city regulations; and temporary off-premises subdivision directional signs.

As originally enacted, the ordinance contained no exception for political signs. On October 19, 1977, the city council amended the ordinance to permit "Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain." (Ord. No. 12189 (New Series).) This amendment may have been prompted by the decision of the Ninth Circuit in *Baldwin* v. *Redwood City* (9th Cir. 1976) 540 F.2d 1360, in which that court held an ordinance regulating temporary signs to be an unconstitutional restriction upon political speech.

[2]The ordinance does not define the term "outdoor advertising display signs." The history of the ordinance and the arguments of the parties demonstrate that the purpose of the ordinance is the prohibition of commercial billboards. But although the amended ordinance excludes signs which fall within 12 specific exceptions, it fails to exclude many

Plaintiffs, Metromedia, Inc., and Pacific Outdoor Advertising Co., Inc., are engaged in the outdoor advertising business and own a substantial number of off-site billboards subject to removal under Ordinance No. 10795. Plaintiffs filed separate actions against the city, attacking the validity of the ordinance. The actions were consolidated by stipulation.[3] After extensive interrogatories and requests for admission had been answered all parties moved for summary judgment.

To facilitate the determination of the motion for summary judgment the parties entered into a stipulation of facts. The following portions of that stipulation are particularly pertinent to the present appeal: "2. If enforced as written Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego. . . . 13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego. . . . 17. The displays have varying values depending upon their size, nature and location. 18. Each of the displays has a fair market value as a part of an income-producing system of between $2,500 and $25,000. 19. Each display has a remaining useful income-producing life in excess of 25 years. 20. All of the signs owned by plaintiffs in the City of San Diego are located in areas zoned for commercial and industrial purposes. . . . 28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through

varieties of less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard. That failure, in light of the absence of a definition of the class of signs prohibited, suggests a danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message.

To avert that danger, and to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail, we adopt a narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment. (Cf. *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 506-507 [134 Cal.Rptr. 668, 556 P.2d 1119]; *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, 144-145 [109 Cal.Rptr. 897, 514 P.2d 697].) We find such a construction in the definition of the term "outdoor advertising display" in Revenue and Taxation Code section 18090.2: "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or use for the display of, a commercial or other advertisement to the public." Although that specific definition was not before the San Diego City Council when it adopted Ordinance 10795, incorporation of that definition into the ordinance will fulfill the city's purpose of banning permanent structures used predominantly for commercial advertising, while avoiding the constitutional issues raised by a less certain or more expansive reading of the ordinance.

[3]Defendants in the consolidated action are the city, the members of the city council, and the city planning director.

the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive. . . . 31. Many of plaintiffs' signs are within 660 feet and others are within 500 feet of interstate or federal primary highways. . . . 34. The amortization provisions of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship."[4]

The trial court filed a memorandum opinion stating that the ordinance was invalid as an unreasonable exercise of police power and an abridgment of First Amendment guarantees of freedom of speech and press. The court then entered judgment enjoining enforcement of the ordinance. The city appeals from that judgment.

2. *The summary judgment cannot be sustained on the ground that the San Diego ordinance exceeds the city's authority under the police power.*

(1a) The San Diego ordinance, as we shall explain, represents a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.[5] The ordinance recites the purposes for which it was enacted,[6] including the elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance of the city. Since these goals are proper objectives for the exercise of the city's police power, the city council, asserting its legislative judgment, could reasonably believe the instant ordinance would further those objectives.

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[4]Plaintiffs filed no declaration to support the motion for summary judgment, but relied solely upon the pleadings, the city's response to interrogatories, and the agreed stipulation of facts.

[5]An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 604 [135 Cal.Rptr. 41, 557 P.2d 473]; *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490 [234 P. 381, 38 A.L.R. 1479].)

[6]Part A of the ordinance declares: "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the

Plaintiffs cannot question that a city may enact ordinances under the police power to eliminate traffic hazards. They maintain, however, that the city failed to prove in opposition to plaintiffs' motion for summary judgment that the ordinance reasonably relates to that objective. We could reject plaintiffs' argument on the simple ground that plaintiffs, as the parties asserting the unconstitutionality of the ordinance, bear the burden of proof (see *Associated Home Builders etc., Inc.* v. *City of Livermore, supra,* 18 Cal.3d 582, 609), and cannot rely upon the city's failure of proof. To avoid unnecessary litigation upon remand of this cause, however, we have probed plaintiffs' broader argument: We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.

Billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway. Whether this distracting effect contributes to traffic accidents invokes an issue of continuing controversy.[7] But as the New York Court of Appeals pointed out, "mere disagreement" as to "whether billboards or other advertising devices . . . constitute a traffic hazard . . . . may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable." (*New York State Thruway Auth.* v. *Ashley Motor Ct.* (1961) 10 N.Y.2d 151 [218 N.Y.S.2d 640, 643, 176 N.E.2d 566].) Many other decisions have upheld billboard ordinances on the ground that such ordinances reasonably relate to traffic safety;[8] we cannot find it manifestly unreasonable for the San Diego City Council to reach the same conclusion. As the Kentucky Supreme Court said in *Moore* v. *Ward* (Ky.

City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

[7]"No matter what one's position on the sign and safety issue one can find the study to support it . . . . [D]espite the insights provided by statistical analyses, the case for the hazards of private signs rests largely upon common sense and the informed judgments of traffic engineers and other experts. The arguments are complex and sometimes highly technical, but on the whole, the courts are increasingly likely to conclude that regulation of private signs may be reasonably expected to enhance highway safety." (Dowds, Private Signs and Public Interests, in 1974 Institute on Planning, Zoning and Eminent Domain, p. 231.)

[8]See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785, 790 [106 Cal.Rptr. 172, 505 P.2d 1012]; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County* (5th Cir. 1970) 425 F.2d 1141, 1152; *General Outdoor Adv. Co.* v. *Department Pub. Works* (1935) 289 Mass. 149, 171 [193 N.E. 799]; *Opinion of the Justices* (1961) 103 N.H. 268 [169 A.2d 762]; *United Advertising Corp.* v. *Metuchen* (1964) 42 N.J. 1, 4 [198 A.2d 447]; *Markham Advertising Co.* v. *State* (1968) 73 Wn.2d 405, 416 [439 P.2d 248].

1964) 377 S.W.2d 881, 884: "Even assuming [plaintiffs] could produce substantial evidence that billboard signs do not adversely affect traffic safety, . . . the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature."

We further hold that even if, as plaintiffs maintain, the principal purpose of the ordinance is not to promote traffic safety but to improve the appearance of the community, such a purpose falls within the city's authority under the police power. In contending that aesthetic considerations cannot justify the exercise of the police power to prohibit billboards, plaintiffs rely on *Varney & Green* v. *Williams* (1909) 155 Cal. 318 [100 P. 867], which held unconstitutional an ordinance of the City of East San Jose prohibiting all advertising billboards. Asserting that the ordinance rested solely on the "promotion of aesthetic or artistic considerations," we stated that "it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property." (*Id.*, at p. 320, quoting *City of Passaic* v. *Patterson Bill Posting Co.* (1905) 72 N.J.L. 285, 287 [29 N.J.L.J. 244, 62 A. 267].)

Constrained by this precedent, subsequent California Court of Appeal decisions have stated that aesthetic considerations cannot justify an ordinance prohibiting billboards. (See *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 255 Cal.App.2d 765, 769 [63 Cal.Rptr. 543]; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal.App.2d 169, 173 [59 Cal.Rptr. 345]; *National Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375, 379 [27 Cal.Rptr. 136].) Only one decision, however, has actually invalidated a city ordinance on this ground. (*City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188, 191-194 [11 Cal.Rptr. 57].) In all other cases the courts have found some additional ground for the ordinance, such as elimination of driving hazards or promotion of tourist traffic. Relying on such additional grounds, the cases conclude that the ordinance did not become unconstitutional merely because aesthetic considerations may have played some part in motivating its enactment.[9]

[9]See *Desert Outdoor Advertising Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 769; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 173; *Burk* v. *Municipal Court* (1964) 229 Cal.App.2d 696, 701-702 [40 Cal.Rptr. 425]; *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, 273 [30 Cal.Rptr. 731]; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 378-379; see also *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, 790.

Thus we could distinguish the present case from *Varney & Green* v. *Williams, supra,* 155 Cal. 318, on the ground that the present ordinance was not enacted exclusively for aesthetic purposes. We believe, however, that the holding of *Varney & Green* v. *Williams,* that aesthetic purposes alone cannot justify assertion of the police power to ban billboards, is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation.

Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value. Consequently any distinction between aesthetic and economic grounds as a justification for billboard regulation must fail. "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." (*Metromedia, Inc.* v. *City of Pasadena, supra,* 216 Cal.App.2d 270, 273; *Burk* v. *Municipal Court, supra,* 229 Cal.App.2d 696, 702.)

The holding of *Varney & Green* v. *Williams* also conflicts with present concepts of the police power. Most jurisdictions now concur with the broad declaration of Justice Douglas in *Berman* v. *Parker* (1954) 348 U.S. 26 [99 L.Ed. 27, 75 S.Ct. 98]: "The concept of the public welfare is broad and inclusive. [Citation.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Id.,* at p. 33 [99 L.Ed. at p. 38].) Although Justice Douglas tendered this description in a case upholding the exercise of the power of eminent domain for community redevelopment, it has since been recognized as a correct description of the authority of a state or city to enact legislation under the police power. (*Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1, 5-6 [39 L.Ed.2d 797, 801-802, 94 S.Ct. 1536]; *City of Phoenix* v. *Fehlner* (1961) 90 Ariz. 13, 17 [363 P.2d 607]; *People* v. *Stover* (1963) 12 N.Y.2d 462, 467-468 [240 N.Y.S.2d 734, 191 N.E.2d 272]; *Oregon City* v. *Hartke* (1965) 240 Ore. 35, 48 [400 P.2d 255]; *Markham Advertising Co.* v. *State, supra,* 73 Wn.2d 405, 424.) As the Hawaii Supreme Court succinctly stated: "We accept beauty as a proper community objective, attainable through use of the police power." (*State* v. *Diamond Motors, Inc.* (1967) 50 Hawaii 33, 36 [429 P.2d 825].)[10]

[10]Among other decisions holding that a state or city pursuant to the police power may ban billboards on the basis of aesthetic considerations alone are: *Meritt* v. *Peters* (Fla. 1953) 65 So.2d 861; *John Donnelly & Sons* v. *Mallar* (S.D.Me. 1978) 453 F.Supp. 1272; *Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660 [370 A.2d 1127, 1133]; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1151; *Cromwell*

Present day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life. Many municipalities engage in projects of one type or another designed to beautify their communities. Indeed, *Varney & Green* v. *Williams* itself asserted "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed." (155 Cal. 318, 320.) But as the New York Court of Appeals pointed out, "Once it be conceded that aesthetics is a valid subject of legislative concern the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. . . . [W]hether such a statute or ordinance should be voided should depend upon whether the restriction was 'an arbitrary and irrational method of achieving an attractive . . . community—and not upon whether the objectives were primarily aesthetic.' " (*People* v. *Stover, supra,* 12 N.Y.2d 462.)

In a subsequent and very recent decision, the New York Court of Appeals confirmed that aesthetic considerations may justify the exercise of the police power to ban all off-site billboards in a community. (*Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263].) "It cannot be seriously argued," the New York court said, "that a prohibition of this nature is not reasonably related to improving the aesthetics of the community." (*Id.,* at p. 490.)[11] The fact

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v. *Ferrier* (1967) 19 N.Y.2d 263 [279 N.Y.S.2d 22, 225 N.E.2d 749, 21 A.L.R.3d 1212]; *Opinion of the Justices, supra,* 103 N.H. 268; *Markham Advertising Co.* v. *State, supra,* 73 Wn.2d 405, 424; *John Donnelly & Sons* v. *Outdoor Advertising Bd.* (Mass. 1975) 339 N.E.2d 709.

Indeed, the four cases cited in *Varney & Green* v. *Williams* to support the proposition that aesthetic considerations will not uphold a prohibition on billboards are no longer law in their respective jurisdictions. *City of Passaic* v. *Patterson Bill Posting Co., supra,* 72 N.J.L. 285, was repudiated by the New Jersey Constitution in 1947. *Commonwealth* v. *Boston* (1905) 188 Mass. 348 [74 N.E. 601], was overruled in *General Outdoor Advertising Co.* v. *Dept. of Public Works* (1935) 289 Mass. 149, 159-161 [193 N.E. 799]; *Bryan* v. *City of Chester* (1905) 212 Pa. 259 [61 A. 849], was distinguished as antedating enactment of zoning enabling legislation by the court in *Silver* v. *Zoning Board* (1955) 381 Pa. 41 [112 A.2d 84]. *People* v. *Green* (1903) 85 App.Div. 400 [83 N.Y.S. 460] was rejected in *People* v. *Stover, supra,* 12 N.Y.2d 462, 466-467, and *Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263, 270.

[11]Numerous cases have commented on the unaesthetic impact of highway billboards. (See, e.g., *State* v. *Diamond Motors, supra,* 50 Hawaii 33, 36; *United Advertising Corp.* v. *Metuchen, supra,* 42 N.J. 1, 6; *Markham Advertising Co.* v. *State, supra,* 73 Wn.2d 405, 417.) Public opinion surveys sponsored by the Federal Highway Beautification Commission indicate that the general public agrees that billboards are unsightly. (See Dowds, Private Signs and Public Interests, *op. cit., supra,* p. 233.)

that the ordinance bans billboards in commercial and industrial areas, and that it permits on-site signs, does not demonstrate that the ordinance as a whole lacks a reasonable relationship to improving community appearance. (*E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1152.) "[T]he notion that an extensively commercial or industrial area will be made more attractive by the absence of billboards is open to debate. Since the issue is debatable, however, the modern judicial presumption in favor of legislation [requires the court] to uphold the ordinance as a rational means of enforcing the legislative purpose of preserving aesthetics." (Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future* (1977) 6 Environmental Aff. 179, 188.)

If the San Diego ordinance reasonably relates to the public safety and welfare, it should logically follow that the ordinance represents a valid exercise of the police power. (2) Plaintiffs contend, however, that the police power is subject to an additional limiting doctrine: That regardless of the reasonableness of the act in relation to the public health, safety, morals and welfare the police power can never be employed to prohibit completely a business not found to be a public nuisance.

This argument also rests on our decision in *Varney & Green* v. *Williams, supra,* 155 Cal. 318. There the court, as an alternative ground for its decision, held the East San Jose ordinance unconstitutional on the grounds that it did "not attempt . . . regulation, but undertakes to absolutely forbid the erection or maintenance of any bill-board for advertising purposes." (P. 321.) No California decision since *Varney & Green* has invalidated a billboard ordinance as prohibitory, but a few decisions of other states have struck down billboard ordinances on this ground. (See *Combined Communications Corp.* v. *Denver* (1975) — Colo. — [542 P.2d 79, 82-83]; *Metromedia, Inc.* v. *City of Des Plains* (1975) 26 Ill.App.3d 942 [326 N.E.2d 59, 61-62]; *Stoner McCray System* v. *City of Des Moines* (1956) 247 Iowa 1313, 1319-1320 [78 N.W.2d 843, 58 A.L.R.2d 1304]; *Norate Corp., Inc.* v. *Zoning Board of Adjustment* (1965) 417 Pa. 397, 407 [207 A.2d 890].)

For the reasons we shall offer, however, we believe that this doctrine, too, conflicts with reality and with current views of the police power. The distinction between prohibition and regulation is one of words and not substance. In the present case, for example, plaintiffs describe the ordinance as a *prohibition of off-site advertising,* while the city describes it

as a *regulation of advertising,* one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between "regulation" and "prohibition," and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292 [40 A.2d 177, 156 A.L.R. 568]; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483; *Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills* v. *Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 502-504 [108 Cal.Rptr. 271], and cases there cited; see *Associated Home Builders etc., Inc.* v. *City of Livermore, supra,* 18 Cal.3d 582, 606, fn. 23.) As the Oregon Supreme Court explained in *Oregon City* v. *Hartke, supra,* 240 Ore. 35, "[I]t is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . . It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." (Pp. 49-50.)

Plaintiffs stress that most of the cases upholding a community ban on billboards or other commercial uses have involved small, predominantly residential towns or rural localities. Recently, however, the Massachusetts Supreme Judicial Court upheld an ordinance similar to the one at issue here involving a total prohibition of billboards in a densely populated town with a sizable business and industrial district. (*John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 339 N.E.2d 709.) The court there stated that "We believe that it is within the scope of the police power for the town to decide that its total living area should be improved so as to be more attractive to both its residents and its visitors. Whether an area is urban, suburban, or rural should not be determinative whether

the residents are entitled to preserve and enhance their environment. Urban residents are not immune to ugliness." (P. 720.)

Relying on the cited Massachusetts decision, the United States District Court for the District of Maine recently upheld a statewide ban on off-site commercial billboards, including urban regions within the state. Its decision observes that it "can find no rational basis for concluding . . . that residents of and visitors to urban, commercial or industrial districts are not entitled to the benefit of an aesthetically pleasing environment, while those living in or visiting suburban, residential or rural regions are." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1281.)

Nor do we perceive how we could rationally establish a rule that a city's police power diminishes as its population grows, and that once it reaches some unspecified size it no longer has the power to prohibit billboards. San Diego, for example, has already prohibited billboards within *97 percent of its limits*—a region which in area and population far surpasses most California cities. Plaintiffs claim that a ban covering 97 percent of the city is a "regulation," while the extension of that ban to the remaining 3 percent of the city is a "prohibition," but such sophistry is a mere play upon words.

Thus the validity of Ordinance No. 10795 under the police power does not turn on its regulatory or prohibitory character, nor upon the size of the city which enacted it, but solely on whether it reasonably relates to the public safety and welfare. **(1b)** As we have explained, the ordinance recites that it was enacted to eliminate traffic hazards, improve the appearance of the community, and thereby protect property values. The asserted goals are proper objectives under the police power, and plaintiffs have failed to prove that the ordinance lacks a reasonable relationship to the achievement of those goals. We conclude that the summary judgment cannot be sustained on the ground that the ordinance exceeds the city's authority under the police power.[12]

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[12] *Varney & Green* v. *Williams, supra,* 155 Cal. 318, is hereby overruled. Language in the following cases contrary to the views expressed herein is disapproved; *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375; *City of Santa Barbara* v. *Modern Neon Sign Co., supra,* 189 Cal.App.2d 188.

3. *The summary judgment cannot be sustained on the ground that the San Diego ordinance on its face abridges freedom of speech.*

(3) Although the trial court held that the San Diego ordinance unconstitutionally invaded the First Amendment rights of billboard advertisers, controlling precedent invalidates that conclusion. On almost every occasion in which a law which prohibited off-site commercial billboards has been challenged as an abridgment of freedom of speech, the courts have rejected that challenge and sustained the law.[13] (See *Howard* v. *State Dept. of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581; *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 339 N.E.2d 709; *Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 370 A.2d 1127, 1132; *United Advertising Corp.* v. *Burrough of Raritan* (1952) 11 N.J. 144 [93 A.2d 362]; *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483; *Markham Advertising Co.* v. *State, supra,* 73 Wn.2d 405.)

Plaintiffs note that some of the decisions in point relied heavily on *Valentine* v. *Chrestensen* (1942) 316 U.S. 52 [86 L.Ed. 1262, 62 S.Ct. 920], in which the Supreme Court declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." (*Id.,* at p. 54 [86 L.Ed. at p. 1265].) Within the last three years, a series of that court's decisions have repudiated *Valentine* v. *Chrestensen* and held that commercial speech may command First Amendment protection. (*Bigelow* v. *Virginia* (1975) 421 U.S. 809 [44 L.Ed.2d 600, 95 S.Ct. 2222]; *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817]; *Linmark Associates* v. *Township of Willingboro* (1977) 431 U.S. 85 [52 L.Ed.2d 155, 97 S.Ct. 1614]; *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691].) Plaintiffs contend that as a result of these decisions, a law prohibiting commercial billboards can no longer be sustained.

When first presented to us, plaintiffs' First Amendment contention presented an arguable issue. While this case was pending before us, however, the New York Court of Appeal, in *Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, upheld a community wide ban on off-site billboards. The advertising company appealed to the United

[13]The only exception is an unreported decision of a Colorado district court in *Combined Communications Corporation* v. *City and County of Denver,* cited in the trial court's memorandum opinion. The Colorado Supreme Court subsequently affirmed the decision without discussion of the First Amendment issue. (*Combined Communications Corp.* v. *Denver* (Colo. 1975) 542 P.2d 79.)

States Supreme Court, which dismissed the appeal for want of a substantial federal question. (— U.S. — [58 L.Ed.2d 101, 99 S.Ct. 66].) Since the Supreme Court regards such a dismissal as a decision on the merits (*Hicks* v. *Miranda* (1975) 422 U.S. 332 [45 L.Ed.2d 223, 95 S.Ct. 2281]), we conclude that the high court has resolved that its commercial speech cases are not inconsistent with ordinances prohibiting off-site billboards. The dismissal of the appeal in *Suffolk Outdoor Advertising* authoritatively establishes that such ordinances do not violate the First Amendment.

An issue remains as to whether the San Diego ordinance violates the free speech clause of the California Constitution. (Art. I, § 2.) We therefore set forth our reasons for concluding that the San Diego ordinance is a permissible regulation of the time, place, and manner of speech, and thus does not abridge freedom of speech under the California Constitution.

Four important decisions of other jurisdictions, filed after the United States Supreme Court first ruled that commercial speech is protected under the First Amendment, have each held that laws prohibiting off-site billboards do not impair freedom of speech. (*John Donnelly & Sons* v. *Outdoor Advertising Bd., supra,* 339 N.E.2d 709; *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483; *Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 370 A.2d 1127, 1132; *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272.) The opinion of Judge Gignoux in *John Donnelly & Sons* v. *Mallar,* the most recent of these decisions, presents a comprehensive exposition of the validity of such laws as regulations of the time, place, and manner of speech. That opinion points out that an ordinance which regulates commercial speech will pass constitutional inspection as a lawful regulation of the time, place, and manner of speech if it satisfies three criteria: "(1) the restriction on speech must be 'justified without reference to the content of the regulated speech,' (2) the restriction must 'serve a significant governmental interest,' and (3) in so doing, the restriction must 'leave open ample alternative channels for communication of the information.' " (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1277, citing *Linmark Associates* v. *Township of Willingboro, supra,* 431 U.S. 85 and *Virginia Pharmacy Board* v. *Virginia Consumer Council, supra,* 425 U.S. 748.) The San Diego ordinance complies with these requirements.

First, the instant ordinance does not seek to suppress the content of the advertiser's message. Each of the high court decisions on which plaintiffs

rely struck down laws aimed at the suppression of a particular message based on the content of that message. *Bigelow* invalidated a law prohibiting advertising which explained how to obtain an abortion; *Virginia Pharmacy Board* invalidated a law banning advertisement of drug prices; *Linmark* invalidated an ordinance banning residential "for sale" and "sold" signs; *Bates* invalidated a state bar rule against attorney advertising. Ordinance No. 10795, by way of contrast, was not enacted to prevent an advertiser from communicating his message to the public, but only to bar him from using a particularly unsightly and intrusive mode of communication.

Second, as we have already explained, the ordinance serves significant governmental interests—promoting traffic safety and improving the appearance of the community—unrelated to the suppression of free expression. (Cf. *United States* v. *O'Brien* (1968) 391 U.S. 367, 377 [20 L.Ed.2d 672, 680, 88 S.Ct. 1673].)

Finally, the ordinance leaves open adequate alternative means of communication. In upholding a Maine statute which imposed a statewide ban on off-site commercial billboards, the federal district court observed that the act "leaves open ample alternative channels for communication of the information now carried by off-premises outdoor advertising. . . . Many, if not all, of the commercial messages displayed on off-premises signs can be conveyed to the traveling public through on-premises advertising, official business directional signs, and tourist information centers and publications, all of which are sanctioned by the Act. . . . Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether . . . ." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1279-1280.)

The New York Court of Appeals, sustaining a community ordinance which prohibited all off-site billboards, reached the same conclusion: "Although prohibiting nonaccessory billboards, the ordinance permits the maintenance of accessory or on-premise billboards, thus providing an operative means of advertising. . . . Since the challenged ordinance . . . regulates only the place and manner in which billboards may be maintained, we conclude that [it] does not infringe the right to free speech guaranteed by the First Amendment." (*Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, app. dism., — U.S. —, — [58 L.Ed.2d 101, 99 S.Ct. 66].)

The foregoing decisions properly hold that a community ordinance prohibiting off-site commercial billboards leaves open adequate alternative means of communication. Advertisers of consumer products and services can communicate through newspapers, magazines, radio, and television. Local business can in addition employ on-site billboards. The relatively few noncommercial advertisers who would be restricted by the San Diego ordinance also possess a great variety of alternative means of communication, including some methods, such as leafleting, which are no more expensive than billboards.[14] The San Diego ordinance is not unique; over 100 cities and towns in California and the entire States of Hawaii and Maine have banned off-site billboards; advertisers in such areas make use of other means of communicating with the public.

In arguing that the San Diego ordinance cannot be sustained as a regulation of time, place, and manner, plaintiffs cite to cases involving leaflets, soundtrucks, newspapers, maps, and other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest.[15] We do not find those cases controlling here. Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

We find support for our conclusion that the city's interest in regulating the commercial use of property justifies the instant ordinance in the decision of the United States Supreme Court in *Young* v. *American Mini Theaters* (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440]. Upholding a

[14]Plaintiffs call attention to stipulation No. 28, which states in part that "Many businesses, politicans, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*. In the present litigation, which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message.

[15]See *Schneider* v. *State* (1939) 308 U.S. 147 [84 L.Ed. 155, 60 S.Ct. 146] (leaflets); *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497 [134 Cal.Rptr. 668, 556 P.2d 1119] (roadside sale of maps); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276 [29 Cal.Rptr. 1, 379 P.2d 481] (soundtrucks); *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294 [138 Cal.Rptr. 53, 562 P.2d 1302] (newsracks).

zoning ordinance which prohibited adult theaters within 500 feet of residential areas or 1,000 feet of other adult establishments, the court held that the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First Amendment values. (See 427 U.S. at p. 63; *id.*, at pp. 76, 84 [49 L.Ed.2d at p. 322; *id.*, at pp. 329, 334] (Powell, J., conc.).) Rejecting the contention that the challenged ordinance abridged freedom of speech, *Young* reiterated the principle that commercial speech acquires only a lesser degree of constitutional protection.[16] Significantly the court, to illustrate that principle, cited several examples of valid regulation of commercial speech, among which was the proposition that "A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere." (427 U.S. at p. 68 [49 L.Ed.2d at p. 325], citing the court's dismissal of the appeal in *Markham Advertising Co.* v. *State, supra,* 73 Wn.2d 405, app. dism., 393 U.S. 316 [21 L.Ed.2d 512, 89 S.Ct. 553].)[17]

The New York Court of Appeals also supports our distinction between billboards and other media. In 1976 that court held unconstitutional an ordinance which prohibited all commercial handbills. (*People* v. *Remeny* (1976) 40 N.Y.2d 527 [387 N.Y.S.2d 415, 355 N.E.2d 375].) One year later, however, the court upheld an ordinance which prohibited all off-site billboards as a permissible regulation of the time, place, and manner of speech. (*Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483.)

In summary, San Diego asserts a strong interest in removing commercial off-site billboards to enhance the appearance of the community and to improve traffic safety. To further those ends, the city enacted a zoning ordinance which does not seek to suppress the content of the advertising messages, but only to prohibit one means by which such messages are

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[16]In *Ohralik* v. *Ohio State Bar Assn.* (1978) [436 U.S. 447 [56 L.Ed.2d 444, 98 S.Ct. 1912], the Supreme Court summarized the limited constitutional protection given commercial speech: "We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . [W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." (436 U.S. at pp. 455-456 [56 L.Ed.2d at p. 453].)

[17]The Maryland Court of Appeals, sustaining a ban on billboards in the Oldtown urban renewal district of Baltimore, relied squarely on the Supreme Court decision in *Young* v. *American Mini Theaters.* (*Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 370 A.2d 1127, 1132.)

placed before the public. A unanimity of published decisions supports the proposition that such an ordinance does not abridge freedom of speech. Finding that the recent commercial speech cases of the United States Supreme Court do not undermine those decisions, and that billboards, as permanent intrusive uses of land, may reasonably be distinguished from other media, we conclude that the San Diego ordinance does not on its face abridge freedom of speech under either the United States or California Constitutions.

4. *The San Diego ordinance is not preempted by the Outdoor Advertising Act.*

Plaintiffs contend that the summary judgment below should be sustained on the ground that Ordinance No. 10795 is preempted by provisions of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). Plaintiffs rely on two provisions: Section 5226, which states generally the legislative policy and findings underlying the Outdoor Advertising Act, and section 5412, which requires payment of just compensation to owners of billboards removed pursuant to the act.

(4) Section 5226 reads as follows: "The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

The significance of section 5226 is not clear; the section states broad policy objectives; it neither explicitly authorizes billboards in business areas nor explicitly limits the authority of municipalities to prohibit billboards in such areas. Although the findings of section 5226 could be

read literally to authorize maintenance of billboards in commercial areas despite any contrary local prohibition[18] such an interpretation seems contrary to section 5229, which provides that "The provisions of this chapter shall not be construed to permit a person to place or maintain in existence . . . any outdoor advertising prohibited by . . . any ordinance of any city . . . ." Section 5230 further confirms the authority of a city under the police power; it states that "The governing body of any city, county, or city and county may enact ordinances, including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays adjacent to any street, road, or highway equal to or greater than those imposed by this chapter."[19]

Viewed in context, section 5226 appears to be a statement of policy, adopted to explain why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays adjacent to state and interstate highways in noncommercial areas, but not for the elimination of such displays within business areas. The section does not constitute a substantive limitation on the police power of the municipality, and thus should not be construed to preempt municipal authority.

(5a) Section 5412, the other provision on which plaintiffs rest their preemption argument, states that: "If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power."[20] As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.*

[18]If section 5226 were construed to authorize billboards in commercial areas of cities, including locations not adjacent to state or interstate highways, it might be invalid as a regulation of a municipal affair. (See *Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63 [81 Cal.Rptr. 465, 460 P.2d 137].)

[19]Further lack of clarity arises from the language of section 5227, which states that "It is the intention of the Legislature to occupy the whole field of regulation by the provisions of this chapter except that nothing in this chapter prohibits . . . the passage by any county of reasonable land use or zoning regulations affecting the placing of advertising displays . . . ." If this language is intended to grant only counties, and not cities, authority to regulate advertising by zoning, it is inconsistent with section 5230.

[20]The quoted language is the text of section 5412 as enacted in 1975. The language of prior section 5412 (enacted in 1970), and of prior section 5288.3a (enacted in 1967 and repealed by the enactment of § 5412) does not differ from the present section in any respect material to the instant case.

Analysis of the alleged preemptive effect of section 5412, consequently, requires a review of the provisions of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131).

The Highway Beautification Act requires removal, following a grace period of 5 years, of all off-site billboards within 660 feet of federal interstate and primary highways, except for billboards located in commercial or industrial areas. Billboards adjacent to federal highways within commercial and industrial areas may also be removed by agreement between the states and the Secretary of Transportation. Subdivision (g) of section 131 provides that "Just compensation shall be paid upon the removal of . . . outdoor advertising signs . . . lawfully in existence on the date of the enactment of this subsection [or] lawfully erected on or after January 1, 1968." The federal government provides 75 percent of such compensation. Under subdivision (b) of section 131, noncomplying states lose 10 percent of their share of federal highway funds; failure to pay just compensation upon removal of signs within the scope of the act constitutes noncompliance requiring imposition of that penalty. (*State of Vermont* v. *Brinegar* (D.Vt. 1974) 379 F.Supp. 606.) Finally, subdivision (k) qualifies the foregoing provisions, stating that "Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays and devices on the Federal-aid highway systems than those established under this section."

In order to avoid the loss of federal highway funds, the California Legislature amended the Outdoor Advertising Act to require payment of just compensation upon removal of off-site billboards located within 660 feet of interstate and primary highways outside of commercial and industrial area when required by federal law. (See Bus. & Prof. Code, §§ 5405, 5408, 5412.)

We perceive no direct conflict between the San Diego ordinance and state law. If the ordinance required the removal of certain billboards without payment of compensation, and the Outdoor Advertising Act required removal of the same billboards with payment or compensation, such a conflict might arise. In fact, however, the city's ordinance and the state act are concerned with different billboards. The Outdoor Advertising Act requires removal of billboards outside of commercial and industrial areas, but does not relate to removal of billboards within such commercial and industrial areas unless such removal is provided for in an agreement between the state and the Secretary of Transportation. The parties do not allege that any such agreement applies to billboards in San

Diego. Ordinance No. 10795, although city-wide in scope, adds to an existing ban on billboards in residential areas only an additional ban covering commercial or industrial areas. All of plaintiffs' billboards are in fact located within commercial or industrial areas. In sum, no case appears in which state law mandates the payment of compensation for any billboard which the ordinance proposes to remove without compensation.

Plaintiffs contend, however, that the Outdoor Advertising Act was intended to deny cities the power to enact ordinances which might subject the state to a 10 percent penalty under the Highway Beautification Act; they argue that the San Diego ordinance, if found to endanger the state's receipt of its full allotment of federal highway funds, would be preempted by state law. (See 55 Ops.Cal.Atty.Gen. 1 (1972).) We explain, however, that a city's enactment of a zoning ordinance prohibiting off-site billboards does not imperil the state's share of its highway allotment.

The City of Alameda in its amicus curiae brief has furnished us with the opinion, dated March 11, 1976, of the chief counsel of the Federal Highway Administration, which states that, "The federal act requires payment of just compensation only for removal of signs lawfully erected and that when a sign becomes a nonconforming use under a local zoning ordinance it ceases to be lawfully erected within the meaning of the law." **(6)** Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act of 1965, its interpretation of the act is entitled to great weight and, if reasonable, should be sustained. (See, e.g., *Northern Ind. Pub. Serv. Co.* v. *Walter League* (1975) 423 U.S. 12, 15 [46 L.Ed.2d 156, 159, 96 S.Ct. 172]; *Los Angeles* v. *Public Utilities Com.* (1975) 15 Cal.3d 680, 696 [125 Cal.Rptr. 779, 542 P.2d 1371].) In the present case, the interpretation of the Federal Highway Administration is entitled to special weight for the state act requires payment of just compensation only when necessary to avoid a federal penalty. The state has no interest in construing its statutes to require payment of compensation in any case in which the federal agency charged with administration of the federal program would not institute action to impose a penalty.

Moreover, the opinion of the Federal Highway Administration demonstrates that the Highway Beautification Act does not require the state to pay just compensation when billboards adjoining interstate or primary highways must be removed to comply with local zoning ordinances. The legislative history of that act indicates that the Congress intended to

require payment of compensation only for billboards removed pursuant to the Highway Beautification Act or state statutes enacted to conform to that act.[21] Courts have uniformly held that local zoning ordinances which ban billboards located on interstate and primary highways are not preempted by state laws enacted to conform to the Highway Beautification Act. (*Art Neon Co.* v. *City and County of Denver* (10th Cir. 1973) 488 F.2d 118, 123; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 772; *City of Doraville* v. *Turner Communications* (1976) 236 Ga. 385 [223 S.E.2d 798, 801]; *Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 370 A.2d 1127, 1131; *Modjeska Sign Studies, Inc.* v. *Berle* (1977) 43 N.Y.2d 468 [402 N.Y.S.2d 359, 373 N.E.2d 255] app. dism., — U.S. — [58 L.Ed.2d 101, 99 S.Ct. 66].)[22]

(5b) In sum, California's Outdoor Advertising Act preempts local ordinances only when those ordinances threaten to subject the state to a penalty under the federal Highway Beautification Act. The federal act, however, does not penalize a state merely because a subdivision of the state, acting pursuant to valid zoning ordinances, requires the removal of billboards without compensation.

5. *The San Diego ordinance does not deny plaintiffs the equal protection of the laws.*

(7a) We reject plaintiffs' contention that the city's failure to pay compensation for the removal of their billboards, in light of the state's payment of compensation to owners of billboards removed under the

[21]The House Report on the Highway Beautification Act stated that "Advertising companies will suffer distress as a result of the control this legislation imposes. As a result the committee feels strongly that . . . compensation must be paid to those individuals who will lose their signs." (H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965).) The Senate Report similarly asserted that "subsection (g) provides just compensation for the owners or leaseholders of advertising structures which must be removed under the provisions of this section." (Sen. Rep. No. 709, 89th Cong., 1st Sess., pp. 6-7 (1965).) In response to questions from other representatives, Representative Edmondson, one of the floor managers of the bill, stated that the bill did not jeopardize the authority of the state to require the removal of billboards without compensation under the police power, and stated specifically that in the absence of an agreement between the federal government and the state for removal of billboards pursuant to the act, the act did not limit the authority of the state with respect to billboards in commercial or industrial zones.

[22]In numerous other cases involving billboards, such as our own decision in *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, the billboard company did not present the preemption argument raised by plaintiffs here. Although the decisions in such cases upholding the ban on billboards may not constitute precedent on issues not raised, it is nonetheless significant that the enactment of the ordinances sustained in those cases did not trigger federal action to withdraw federal highway funds from the states.

Outdoor Advertising Act, denies them the equal protection of the laws. Since the distinction involves purely economic regulation it may be sustained if the classification bears a rational relationship to a legitimate state purpose. (*People* ex rel. *Dept. of Transportation* v. *Desert Outdoor Advertising, Inc.* (1977) 68 Cal.App.3d 440, 450 [137 Cal.Rptr. 221].)

(8) California decisions establish that a city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period. (See *Livingston Rock etc. Co.* v. *County of L. A.* (1954) 43 Cal.2d 121, 127 [272 P.2d 4].) The choice between the alternatives largely involves budgetary considerations. **(7b)** In the present instance the state, its funds augmented by a 75 percent federal contribution, reasonably chose to pay compensation and thus eliminate billboards without concern for any amortization period; the city, lacking such federal funds, reasonably chose the more economical alternative of requiring abatement only after expiration of an amortization period. We find no denial of equal protection in that decision.

6. **(9a)** *The summary judgment cannot be sustained on the ground that the amortization period prescribed by the ordinance as applied to all or any of plaintiffs' signs is unreasonably short.*

The San Diego ordinance requires abatement of all off-site billboards following expiration of an amortization period. That period is computed in the following manner: First, the owner determines the original cost of the sign, including the cost of installation. Second, he deducts 10 percent of that cost for each year the sign has been standing prior to the effective date of the ordinance, arriving at a figure which the ordinance refers to as "the adjusted market value." The ordinance then provides an abatement schedule ranging from one year for signs with an "adjusted market value" of less than $500 to four years for signs with an "adjusted market value" in excess of $20,000.[23]

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[23]The ordinance was enacted March 14, 1972. It provides the following abatement schedule:

"Adjusted Market Value			Abatement Date
Less than	$	500.00	April 1, 1973
$ 500.00	to	999.99	July 1, 1973
1,000.00	to	1,499.99	October 1, 1973
1,500.00	to	1,999.99	January 1, 1974
2,000.00	to	2,999.99	April 1, 1974
3,000.00	to	3,999.99	July 1, 1974

Finally, the ordinance states that notwithstanding the abatement schedule in the ordinance, any signs located within 500 feet of freeways or scenic highways must be removed within 90 days. This provision is based on the fact that such signs were rendered nonconforming uses by prior city zoning ordinances. Since those prior ordinances had been in force for about three years before the effective date of Ordinance No. 10795, the signs in question received an actual amortization period of at least three years and ninety days.

Thus the amortization period under the ordinance depends upon the conformity of the signs under prior ordinances, the original cost of the signs, and the time elapsed since erection of the signs. As the parties stipulated, the abatement schedule is not computed on the basis of current fair market value, useful life, or income generated by the signs. Relying on that stipulation, plaintiffs contend that the amortization period is unreasonable on its face and hence that the ordinance, to the extent that it requires removal of billboards without compensation or a reasonable amortization period, denies due process of law. The trial court in its memorandum opinion granting the motion for summary judgment found that plaintiffs had not provided sufficient proof that the abatement schedule was unreasonable as applied to their billboards.

(10) The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. (*National Advertising Co.* v. *County of Monterey* (1970) 1 Cal.3d 875, 878 [83 Cal.Rptr. 577, 464 P.2d 33]; *Livingston Rock etc. Co.* v. *County of Los Angeles, supra,* 43 Cal.2d 121, 127; *City of Los Angeles* v. *Gage* (1954) 127 Cal.App.2d 442, 454-460 [274 P.2d 34].) The determination of the length of a reasonable period of amortization is not merely a matter of accounting. "It is not required that the nonconforming property concerned have no value at the termination date." (*Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 121.) The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail. (*Hada-*

4,000.00 to	4,999.99	October 1, 1974
5,000.00 to	7,499.99	January 1, 1975
7,500.00 to	9,999.99	April 1, 1975
10,000.00 to	12,499.99	July 1, 1975
12,500.00 to	14,999.99	October 1, 1975
15,000.00 to	19,999.99	January 1, 1976
20,000.00	and over	April 1, 1976."

check v. *Sebastian* (1915) 239 U.S. 394 [60 L.Ed. 348, 36 S.Ct. 143]; *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d at p. 121; *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d at p. 886 (dis. opn. of Sullivan, J.); *City of La Mesa* v. *Tweed & Gambrell Mill* (1956) 146 Cal.App.2d 762, 770 [304 P.2d 803]; *City of Los Angeles* v. *Gage, supra,* 127 Cal.App.2d at p. 461; *Modjeska Sign Studios, Inc.* v. *Berle, supra,* 43 N.Y.2d 468.)[24]

In reviewing the constitutionality of an ordinance providing for amortization of nonconforming billboards we held in *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, that a one-year amortization period was unreasonable except as to signs which had been fully depreciated for federal income tax purposes. (*Id.,* p. 880.) Other decisions have also stated that a one-year amortization period is generally unreasonable (*National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 381; *City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.App.2d 188, 195-196 [11 Cal.Rptr. 57]), but have upheld amortization periods ranging from two years and eight months (*People* ex rel. *Dept. Pub. Wks.* v. *Adco Advertisers* (1973) 35 Cal.App.3d 507, 513 [110 Cal.Rptr. 849]), to three years (*City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785; *Naegels Outdoor Adv. Co.* v. *Village of Minnetonka* (1968) 281 Minn. 492 [162 N.W.2d 206]), to five years (*Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1154). **(9b)** In light of those decisions we conclude that the amortization period provided in the instant ordinance which ranges from one to four years, depending upon the depreciated value of the sign, is not unreasonable on its face.

Our conclusion that the amortization schedule established in the San Diego ordinance is not facially unreasonable does not demonstrate its validity as applied to each of plaintiffs' signs. **(11a)** The reasonableness of an amortization period as applied to each billboard depends in part upon facts peculiar to that structure (see *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879, and cases there cited;

[24]In determining the reasonableness of the period of amortization a great variety of factors may be relevant. As listed in *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122, the factors include "the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes and depreciation for other purposes and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area."

Bohannan v. *City of San Diego* (1973) 30 Cal.App.3d 416, 426 [106 Cal.Rptr. 333]) such facts include the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.

(9c) Plaintiffs have the burden of proving the invalidity of the amortization period as applied to each of plaintiffs' structures. (See *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 121; *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879.) On motion for summary judgment plaintiffs did not attempt to meet this burden as to each structure, but limited their argument to the claim that the abatement schedule was facially unconstitutional because it was not based upon the fair market value or remaining useful life of the billboard. **(11b)** But even though the fair market value and remaining useful life are relevant considerations—they are among the factors which must be evaluated in defining the private loss which is balanced against the public benefit in order to determine the reasonable period of amortization—the failure of the city to base its abatement schedule upon such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact that the city arrived at that period by a formula which did not include every one of the relevant considerations does not render its ordinance unconstitutional.[25]

As we have stated, on their motion for summary judgment plaintiffs did not attempt to prove the amortization period was unreasonable as applied to specific signs, except for those signs located within 500 feet of freeways and scenic highways for which this ordinance prescribed an amortization period of only 90 days. The city explains, however, that such signs were already nonconforming uses pursuant to an ordinance enacted more than three years earlier and consequently that plaintiffs had already enjoyed an amortization period of three years with respect to such signs. Plaintiffs' evidence fails to demonstrate that an amortization period of three years and ninety days is unreasonably short as applied to any of the signs in question. We therefore conclude that the summary judgment in favor of plaintiffs cannot be sustained on the ground that the amortiza-

[25]Even if the amortization period were found to be unreasonable as to a particular property, that finding would "not invalidate its application to other property or invalidate the ordinance of which it is a part." (*Bohannan* v. *City of San Diego, supra,* 30 Cal.App.3d 416, 426.)

tion period of the ordinance is unreasonable as to all or any of plaintiffs' billboards.

7. **(12)** *The summary judgment cannot be sustained on the ground that the City Council of San Diego failed to comply with the California Environmental Quality Act.*

Plaintiffs contend that Ordinance No. 10795 is invalid because the city council failed before enacting that ordinance to prepare an environmental impact report as required by Public Resources Code section 21151. Plaintiffs' complaints, however, do not allege the city's noncompliance with the requirements of the California Environmental Quality Act, and although over three years elapsed between the filing of those complaints and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. On motion for summary judgment the pleadings define the issues; thus " 'In the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.' " (*Krupp* v. *Mullen* (1953) 120 Cal.App.2d 53, 57 [260 P.2d 629]; *Gardenswartz* v. *Equitable etc. Soc.* (1937) 23 Cal.App.2d Supp. 745, 752 [68 P.2d 322]; see *Dawson* v. *Rash* (1958) 160 Cal.App.2d 154, 161 [324 P.2d 959].) The issue of the city's alleged noncompliance with the California Environmental Quality Act therefore was not properly before the trial court on the motion for summary judgment, and thus cannot be asserted here as a ground for sustaining that judgment.

8. *Conclusion.*

In summary, we conclude that neither the federal nor state Constitutions nor the state's Outdoor Advertising Act bar a municipality from enacting a zoning ordinance which prohibits off-site billboards and requires removal of existing billboards after expiration of a reasonable amortization period. Plaintiffs retain the right to show that the amortization period prescribed by the San Diego ordinance is unreasonably short as applied to some or all of their structures. Because plaintiffs have failed to demonstrate the invalidity of the ordinance on its face, however, the trial court erred in granting their motion for summary judgment.

To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism. We conclude with the pungent words of Ogden Nash:

"I think that I shall never see
"A billboard lovely as a tree.
"Indeed, unless the billboards fall,
"I'll never see a tree at all."

The judgment is reversed.

Bird, C. J., Mosk, J., and Manuel, J., concurred. Newman, J., concurred in the result.

RICHARDSON, J.—I concur in the judgment. I share some of the substantial doubts raised by the dissent of Justice Clark, who discerns serious constitutional difficulties with any governmental scheme calling for the total prohibition of any legitimate business enterprise. Nonetheless, I am persuaded by the majority's analysis that the present ban on off-site billboards meets the minimum constitutional standards perceived by the United States Supreme Court and that, accordingly, the challenged ordinance must be upheld.

The high court has recently dismissed for want of a substantial federal question an appeal which raised identical issues. In *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263], the New York Court of Appeals upheld a local ordinance totally banning all off-site billboards as a rational method of improving community aesthetics. The majority herein correctly observes that the subsequent dismissal of the appeal to the United States Supreme Court must be regarded as a dispositive decision on the merits. (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-344 [45 L.Ed.2d 223, 235-236, 95 S.Ct. 2281].) No basis appears for distinguishing *Suffolk* nor has any attempt been made to do so. I concur in the judgment of reversal.

CLARK, J.—I dissent.

The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, the medium has played a prominent role throughout American history rallying support for causes ranging from the Revolution to seatbelts and the 55 mph speed limit. (See, Davidson, Propaganda and The American Revolution (1941) University of North Carolina Press; Houck, Outdoor Advertising: History and Regulation (1969) University of Notre Dame Press.) The majority today call for the absolute

prohibition of this medium of expression which, while frequently commercial in nature, is clearly within the ambit of First Amendment protection. (*Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691]; *Linmark Associates, Inc.* v. *Willingboro* (1977) 431 U.S. 85 [52 L.Ed.2d 155, 97 S.Ct. 1614]; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* (1976) 425 U.S. 748 [48 L.Ed.2d 346, 96 S.Ct. 1817]; *Bigelow* v. *Virginia* (1975) 421 U.S. 809 [44 L.Ed.2d 600, 95 S.Ct. 2222]; *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497 [134 Cal.Rptr. 668, 556 P.2d 1119].)[1]

First Amendment protection extends to virtually all media utilized to disseminate ideas. (*Police Department of Chicago* v. *Mosley* (1972) 408 U.S. 92 [33 L.Ed.2d 212, 92 S.Ct. 2286] [picketing]; *Schneider* v. *State* (1939) 308 U.S. 147 [84 L.Ed. 155, 60 S.Ct. 146] [leafletting]; *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497 [roadside sale of maps]; *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77 [112 Cal.Rptr. 777, 520 P.2d 1] [posting signs on public utility poles]; *Dillon* v. *Municipal Court* (1971) 4 Cal.3d 860 [94 Cal.Rptr. 777, 484 P.2d 945] [demonstrations and parades]; *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276 [29 Cal.Rptr. 1, 379 P.2d 481] [sound trucks]; *California Newspaper Publishers Assn., Inc.* v. *City of Burbank* (1975) 51 Cal.App.3d 50 [123 Cal.Rptr. 880] [newspaper racks].) "The right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284.)

Relying on cases generally predating Supreme Court decisions protecting commercial speech,[2] the majority purport to justify the ordinance's

[1]The Supreme Court has reaffirmed its position that commercial interests are entitled to essentially the same constitutional protections as are personal interests. (See *Marshall* v. *Barlow's, Inc.* (1978) 436 U.S. 307 [56 L.Ed.2d 305, 98 S.Ct. —] [38 CCH Supreme Court Bulletin, p. B2275].) In the *Marshall* case the court held the inspection of commercial premises for the purpose of ascertaining compliance with the Occupational Safety and Health Act of 1970 was impermissible when Fourth Amendment prohibitions were not observed.

[2]Only four of the cases cited by the majority—*Suffolk Outdoor Advertising Co. Inc.* v. *Hulse* (1977) 43 N.Y.2d 483 [402 N.Y.S.2d 368, 373 N.E.2d 263], *John Donnelly & Sons* v. *Mallar* (1978) 453 F.Supp. 1272, *Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660 [370 A.2d 1127] and *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd.* (Mass. 1975) 339 N.E.2d 709—have been decided since *Bigelow* v. *Virginia, supra,* 421

blanket prohibition, claiming (1) outdoor signs are not entitled to the same protection as other speech, (2) governmental interests here involved weigh heavily in the balance, and (3) there are "probable" alternative means for plaintiffs to communicate their public messages.

The messages communicated by outdoor signs are entitled to the same protection as other speech. The majority ignore our recent case of *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, where in dealing with an ordinance prohibiting the sidewalk sale of maps to the homes of movie stars, we noted "[t]he fact that some may view the map as lacking opinion, newsworthiness or information of social worth, is constitutionally irrelevant. . . . Mrs. Welton and her maps are entitled to the same First Amendment protection as the political candidate and his political pamphlet." (*Id.,* at p. 504.)

The majority attempt to distinguish outdoor signs from "other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest" (e.g., leafletting, sound trucks, etc.) because an outdoor sign is a "large, immobile and permanent structure" as opposed to "more transitory and less obtrusive media." (*Ante,* p. 782.) Such distinction suffers from the same overbreath as the ordinance itself. While the ordinance seeks to prohibit small, unobtrusive *off-site* signs, it allows obtrusive and perhaps even offensive *on-site* billboards. Being equally inconsistent, the majority sustain the prohibition of offensive billboards but support the use of sound trucks, picketing, leafletting and demonstrations as constituting "more transitory or less obtrusive media."

Obtrusiveness does not justify total prohibition of protected expression. In *Erznoznick* v. *City of Jacksonville* (1975) 422 U.S. 205 [45 L.Ed.2d 125, 95 S.Ct. 2268], the Supreme Court struck down a city ordinance prohibiting the exhibition of a motion picture displaying the bare female body by a drive-in theater whose screen was visible from a public street.

U.S. 809. Of these, *John Donnelly & Sons, Inc.* is distinguishable. There the court specifically noted "the Donnelly signs were found by the Board to 'contain purely commercial copy.' " (*John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 339 N.E.2d 709, 721.) The signs prohibited by the instant ordinance communicate "valuable . . . political and social information" as well as commercial messages. (Joint Stipulation of Facts No. 28, *ante,* p. 770.) *John Donnelly & Sons* is also distinguishable as the Maine statute there involved exempts political advertising from its prohibitions. (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, —.) Finally, *Donnelly Advertising Corp.* is also distinguishable as the Baltimore ordinance there involved prohibited billboards only in an "Oldtown" renewal area—billboards remained permissible in other parts of the city. (*Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 370 A.2d 1127, 1132.)

Off-site advertising hardly commands the same attention as the "unique type of eye-catching display" of an animated drive-in movie (*id.*, at p. 222 [45 L.Ed.2d at p. 138]; Burger, C. J., dis.), yet the court noted "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' " (*Id.*, at p. 212 [45 L.Ed.2d at p. 132].)

Obtrusiveness is thus concerned not only with the quality or degree of offensive intrusion, but also with the ability of the offended to avoid it. Is it not fair to assume that a display of animated nudes on a screen constitutes an intrusion of greater degree than a still sign or symbol advertising some product? Yet the Supreme Court did not find the nude display so offensive that its effect could not be kept within permissible limits. Because off-site displays are also not so offensive that they cannot be kept within reasonable limits, San Diego's absolute prohibition is an impermissible infringement on First Amendment protection, and it must fail for overbreadth.

The majority's claim the ordinance may be justified by tilting the balance in favor of the government interests involved is unpersuasive. Recognizing that aesthetic beauty and traffic safety are legitimate police power objectives, the majority fail to show these interests overcome First Amendment rights of plaintiffs, advertisers and the viewing public.[3] The traditional conflict between police powers on the one hand and First Amendment rights on the other must seek compromise, allowing government to reasonably regulate the time, place and manner in which First Amendment rights may be exercised. (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104 [33 L.Ed.2d 222, 92 S.Ct. 2294]; *Healy* v. *James* (1972) 408 U.S. 169 [33 L.Ed.2d 266, 92 S.Ct. 2338]; *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497; *Burton* v. *Municipal Court* (1968) 68 Cal.2d 684; *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276.) Thus, it has been held government may validly regulate the use of newsracks (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294 [138 Cal.Rptr. 53, 562 P.2d 1302]), sound trucks (*Kovacs* v. *Cooper* (1949) 336 U.S. 77 [93 L.Ed. 513, 69 S.Ct. 448, 10 A.L.R.2d 608]), street sales of goods or merchandise (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497), and the operation of "adult" movie theaters (*Young* v. *American Mini Theaters* (1976) 427 U.S. 50 [49 L.Ed.2d 310, 96 S.Ct. 2440]). Likewise, off-site advertising signs may be reasonably regulated.

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[3]It is well-settled that the right to receive "information of potential interest and value" is protected by the First Amendment. (*Bigelow* v. *Virginia, supra,* 421 U.S. 809, 822 [44 L.Ed.2d 600, 612, 95 S.Ct. 2222]; see also *Stanley* v. *Georgia* (1969) 394 U.S. 557, 564 [22 L.Ed.2d 542, 549, 89 S.Ct. 1243].)

Notwithstanding the state's power to regulate, such power "does not necessarily sanction the outright prohibition." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284.)[4] To be constitutionally reasonable, a time, place or manner regulation must be written narrowly and explicitly, in furtherance of a legitimate police power purpose. (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497.) But here the majority thumb-push police power objectives so far from center balance as to abolish protected speech. The *absolute prohibition* of off-site signs is justified by neither community appearance nor traffic improvement. Furthermore, the ordinance—written in terms of total prohibition—is not susceptible to interpretation avoiding constitutional infirmity. (See *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497.)

The third purported justification urged by the majority in support of the ordinance—existing "adequate alternative means" for advertisers to communicate their messages—is likewise without merit. The stipulations of the parties establish that in numerous situations traditional off-site advertising is the only practical means of communicating ideas. (See joint stipulation of facts No. 28, *ante,* p. 770.) Alternative methods may be prohibitively expensive or ineffective. Enforcement of the ordinance as written will eliminate this means. (See joint stipulation of facts No. 2, *ante,* p. 770.)

Recognizing freedom of speech entails not only communication, but effective communication, courts have refused to uphold absolute prohibition of a medium when there exists no practical alternative. In our recent case of *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, we unanimously invalidated on First Amendment grounds an ordinance banning sidewalk and parkway sales of commercial books, magazines, maps, and other constitutionally protected material despite readily apparent alternative methods of distribution. We noted the "city has failed to demonstrate that such a broad prohibition is necessary to the attainment of a legitimate police power purpose. Its interest in abating public nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available." (*Id.,* at pp. 507-508.) In *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, we held unconstitutional an ordinance prohibiting use of stationary sound trucks

[4]See also, *Young* v. *American Mini Theaters, supra,* 427 U.S. 50, where the court, while upholding a zoning ordinance restricting the location of "adult" theaters, was careful to observe the First Amendment protected such communication from total suppression.

where other methods including moving sound trucks were available. Similarly, in *Linmark Associates, Inc.* v. *Willingboro, supra,* 431 U.S. 85, the Supreme Court rejected a contention that because of ample alternative methods of communication, an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs should be sustained.[5]

There being no basis upon which the absolute prohibition of outdoor advertising can be justified against First Amendment speech, the judgment should be affirmed.

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[5]The majority's statement that the "possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*" (*ante,* p. 782), ignores both the joint stipulation of facts by which we are bound and traditional First Amendment overbreadth analysis. The parties' stipulation that many advertisers rely exclusively on outdoor advertising provides more than mere "possibility" that communication will be impeded. Furthermore, while the overbreadth doctrine may not apply with the same force in situations involving commercial speech (see *Bates* v. *State Bar, supra,* 433 U.S. 350, 380 [53 L.Ed.2d 810, 833]), the instant ordinance affects social and political expressions as well as commercial speech. It is apparent, for instance, that political expression will be significantly curtailed although political campaign posters are authorized. The restriction to temporary signs, less efficient in terms of cost and effectiveness than the prohibited large and permanent display structures whose costs can be depreciated over long periods, will work to the detriment of "the poorly financed causes of little people" (*Martin* v. *Struthers* (1943) 319 U.S. 141, 146 [87 L.Ed. 1313, 1319, 63 S.Ct. 862]), whose proponents are unable to afford other more costly mass media advertising.

MAY 16 1980

ORDER DUE
C-1 May 14, 1980

ORDER DENYING REHEARING

L.A. No. 30782

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

METROMEDIA, INCORPORATED, ET AL.

v.

CITY OF SAN DIEGO ET AL.

Opinion modified.

Appellants' petition

for rehearing DENIED.

SUPREME COURT
FILED
MAY 14 1980
G. E. BISHEL, Clerk

Deputy

Bird

Chief Justice

MAY 16 1980
SUPREME COURT
FILED
MAY 14 1980
G. E. DISHEL, Clerk
Deputy

D-1

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

METROMEDIA, INCORPORATED et al., Plaintiffs and Respondents, v. CITY OF SAN DIEGO et al., Defendants and Appellants.	L.A. 30782 Super. Ct. Nos. 332881 and 333292

MODIFICATION OF OPINION

BY THE COURT:

The opinion herein, appearing at 26 Cal.3d 848, is modified by deleting therefrom the last sentence of footnote 27 (on p. 879) and the last sentence of footnote 28 (on p. 880).

DIVISION 7

GENERAL SIGN REGULATIONS
(Added 3-14-72 by Ord. 10795 N.S.)

(Old DIVISION 7 — ARCHITECTURAL CONTROL — Incorp. 1-22-52 by Ord. 5046 N.S., amended 3-14-72 by Ord. 10795 N.S.)

(New DIVISION 7 — GENERAL SIGN REGULATIONS — Added 3-14-72 by Ord. 10795 N.S.)

SEC. 101.0700 PROHIBITION AND ABATEMENT OF OUTDOOR ADVERTISING DISPLAY SIGNS

A. PURPOSE AND INTENT

It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare.

B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises;

or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.

2. Any sign identifying a product which is not produced, sold or manufactured on the premises.

3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

C. ABATEMENT OF NONCONFORMING SIGNS

Any sign which is nonconforming in that it does not conform to the regulations embodied in this Division shall either be removed or brought into compliance with the Code requirements within the period of time prescribed herein dating from the effective date of these regulations.

D. ABATEMENT SCHEDULE

All nonconforming signs shall be removed or brought into compliance with the Code requirements in accordance with the abatement schedule set forth below. In order to utilize the abatement schedule, the owner of record, or his agent, shall make available the market value, as of April 1, 1972, of any sign or signs which have been deemed nonconforming by the provisions of these regulations. The market value of nonconforming signs shall be based on the original cost, including cost of installation, of said sign less ten percent of the original cost per year for each year said sign has been standing prior to the effective date of these regulations.

The date of erection of any nonconforming sign shall be established by the presentation by the owner of record of the sign, or his agent, of a certified copy of the corresponding building permit on file in the Department of Building Inspection of The City of San Diego. Any sign erected without the

issuance of a valid building permit shall be deemed an illegal sign and shall be removed immediately.

All required documentation concerning the market value and erection date of any nonconforming sign shall be presented to the Zoning Administrator within ten days of reception of notice of nonconformance. The Zoning Administrator shall determine to his satisfaction the validity of all presented documentation. Any decision of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

ABATEMENT SCHEDULE

Adjusted Market Value	Abatement Date
Less than 500.00	April 1, 1973
$ 500.00 to 999.99	July 1, 1973
1,000.00 to 1,499.99	October 1, 1973
1,500.00 to 1,999.99	January 1, 1974
2,000.00 to 2,999.99	April 1, 1974
3,000.00 to 3,999.99	July 1, 1974
4,000.00 to 4,999.99	October 1, 1974
5,000.00 to 7,499.99	January 1, 1975
7,500.00 to 9,999.99	April 1, 1975
10,000.00 to 12,499.99	July 1, 1975
12,500.00 to 14,999.99	October 1, 1975
15,000.00 to 19,999.99	January 1, 1976
20,000.00 and over	April 1, 1976

Notwithstanding any other provisions of this Code, all outdoor advertising display signs which are not signs designating the name of the owner or occupant of the premise upon which such signs are placed or which do not identify such premises or which do not advertise goods manufactured or produced or services rendered on the property upon which such signs are placed and which are signs designed to be viewed from any portion of a freeway, landscaped freeway, scenic highway or freeway, or parkway as defined in Sections 95.0302.1, 95.0302.2, 95.0302.3 and 95.0302.4 of this Code and are located within 500 feet from the boundary line of said freeway, landscaped freeway, scenic highway or freeway, or parkway shall be abated within 90 days of the effective date of these regulations. Any such sign not

abated within 90 days of the effective date of these regulations shall be subject to all of the provisions of Section 101.0700, paragraph E.

E. REMOVAL OF NONCONFORMING SIGNS

Any sign that is in noncompliance with the regulations of this Code as defined in Section 101.0700 shall be removed prior to or upon the date designated for removal in the above abatement schedule. If the owner of, or the person or persons responsible for, the sign fails to remove the nonconforming sign, the owner of the premises upon which the sign is located shall be responsible for the removal of the sign and the work shall be done within 90 days following the date of nonconformance. The procedure for the removal of all nonconforming signs shall be as follows:

1. The Zoning Administrator, after proper notification, may cause the removal of any nonconforming sign and shall, at his discretion, charge the costs incurred against any of the following, each of whom shall be jointly and severally liable for said charges; provided, however, that any decision or determination of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

a. The permittee.

b. The owner of the sign.

c. The owner of the premises on which the sign is located.

d. The occupant of the premises on which the sign is located.

2. A sign removed by the City shall be held not less than 30 days by the City during which time it may be recovered by the owner upon payment to the City for costs of removal and storage. If not recovered prior to expiration of the 30-day period, the sign and supporting structures shall be declared abandoned and title thereto shall vest in the City and the cost of removal shall be billed to the owner.

F. SIGNS EXEMPT FROM THESE REGULATIONS

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.

2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.

3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.

4. Commemorative plaques of recognized historical societies and organizations.

5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.

6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.

7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.

10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.

11. Temporary off-premises subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.

12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain.

G. CONFLICT WITH OTHER REGULATIONS OF THIS CODE

Where there is a conflict between the regulations of Section 101.0700 and the regulations of any other section of the Code, the regulations of Section 101.0700 shall prevail; provided, however, that the regulations of other sections shall prevail in the following cases:

1. Where the regulations of any other section are more restrictive.

2. Where a sign control district has been established by ordinance, provided that the assigned regulations of said district are comprehensive and provide sign regulations for all zones located within said district.

3. Where a planned district has been established in accordance with the procedure set forth in Section 103.0101 of this Code, provided that any such planned district regulations shall include comprehensive sign regulations encompassing the entire planned district area.

4. Where an architectural control district has been established by ordinance, provided that any such architectural control district regulations shall include comprehensive sign regulations encompassing the entire architectural control district area.

H. COMPLIANCE WITH CHAPTER IX OF THIS CODE

Nothing in the regulations of Section 101.0700 shall relieve any party from the requirements to obtain any or all permits required by Chapter IX of this Code.

(Added 3-14-72 by Ord. 10795 N.S.)

(Amended 10-19-77 by Ord. 12189 N.S.)

§ 131. Control of outdoor advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or

after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are

zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Insterstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not

be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the

Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,-500,000 for the fiscal year ending June 3, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are on existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q) (1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

§ 5412. Compensation for removal of advertising displays: Legislative intent

If federal law requires the states to pay just compensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power.

23 U.S.C. Section 131(g) (as amended by Public Law 93-643, Section 109, January 4, 1975, 88 Stat. 2284):

> (g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law. . . .

23 U.S.C. Section 131(k) (as added by Public Law 89-285, Title I, Section 101, October 22, 1965, 79 Stat. 1028):

> (k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays and devices on the Federal-aid highway systems than those established under this section.

AMENDMENT X

State Rights

[Section 1.] The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

No. 80-196

SEP 9 1980

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF SAN DIEGO, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator,

Petitioners,

v.

METROMEDIA, INC., a corporation, doing business as Foster & Kleiser, and PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Did the California Supreme Court correctly construe the Federal Highway Beautification Act, 23 U.S.C. § 131, so as to conclude that the California Outdoor Advertising Act preempted the authority of the City of San Diego to require the removal, without compensation, of billboards located in commercial and industrial zones within 660 feet of Federal Interstate or primary highways?

2. Does the Federal Highway Beautification Act violate the Tenth Amendment to the United States Constitution?

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H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 3710 10, 11, 12

H.R. Rep. No. 713, 90th Cong., 1st Sess. (1967)..... 13

H.R. Rep. No. 95-1485, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 6565 15, 18-19

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H.R. Conf. Rep. No. 95-1797 (Oct. 14, 1978) 16

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S.Rep. No. 542, 90th Cong., 1st Sess. (1967) 11n, 13

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Other Authorities:

Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich.L.Rev. 1295 (1973) 13n

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No. 80-196

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BRIEF FOR RESPONDENTS IN OPPOSITION TO CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of California (Appendix A of the Jurisdictional Statement filed by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. in No. 80-195) is reported at 26 Cal.3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 and set forth at A. 1a of the Appendix to the Jurisdictional Statement.* Previous opinions in the case are, as well, set forth in the Appendix to the Jurisdictional Statement and are described in the "Opinions Below" section thereof.

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* References to "A.——a" are to the appropriate pages of the Appendix of the Jurisdictional Statement filed in No. 80-195.

Jurisdiction

The jurisdictional requisites are adequately set forth in the conditional cross petition.

Constitutional, Statutory, and Regulatory Provisions Involved

Pertinent provisions of the Tenth Amendment to the United States Constitution, the Federal Highway Beautification Act, 23 U.S.C. § 131 (1976 & Supp. II 1978), the California Business and Profesional Code Section 5412 (West 1974 & Supp. 1980), and San Diego Ordinance No. 10795 (New Series) are set forth in the conditional cross petition as Appendices E, F, G, H and I.

Statement of the Case

The Statement of the Case set forth in the Jurisdictional Statement filed by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. in No. 80-195 contains the basic facts to which the parties have stipulated. In one such stipulation, the parties agreed that the amortization provisions of San Diego Ordinance No. 10795 "have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship." (A. 126a-27a, JS 34) In another, the parties stipulated that: "Many of the Plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom." (A. 126a, JS 31)

In these litigations, commenced by Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., an injunction was sought to enjoin enforcement of San Diego Ordinance No. 10795. The opinion of the Superior Court, concluding that

the ordinance was unconstitutional on First and Fourteenth Amendment grounds, did not pass on the issue of whether compensation would have been required to be paid for the removal of signs within 660 feet of Interstate or Federal-aid primary highways. (81a-97a)

The Court of Appeals, Fourth Appellate Department, which held that the San Diego Ordinance constituted "an unreasonable and arbitrary exercise of [San Diego's] police power" (A. 80a), stated, in part that:

> ". . . signs which abut interstate and primary highways are of state-wide concern because of their effect upon the state's right to federal highway funds. Undoubtedly the paramount legislative purpose prompting the California Legislature to enact the Outdoor Advertising Act was its concern not to lose California's share of federal highway funds and not to incur any penalty as a result of noncompliance with the Federal Highway Beautification Act (23 U.S.C. § 131, *et seq.*). Under the Act a state must enact laws providing 'effective control' of billboards or be subject to a penalty of 10% of its allocated federal highway funds during each year of noncompliance (23 U.S.C. § 131(b)). Section 131(g) of the Act provides that just compensation shall be paid upon removal of any outdoor advertising sign, display, or device lawfully erected under state laws. Section 131(b)'s requirement that states provide 'effective control' undoubtedly includes section 131(g)'s mandate for payment of 'just compensation.' (See 55 Op. Att'y Gen. 1) Thus enforcement of the City's ordinance requiring the removal of signs in this category without payment of compensation might well subject the State of California to the loss of 10% of the funds allocated by the federal government for highway construction purposes." (A. 78a)

After initially deciding that signs within commercial and industrial zones were exempt from the Act,* the California Supreme Court, upon rehearing, vacated its earlier opinion. (A. 1a-63a) Concluding that the decision in *Ackerley Communications, Inc.* v. *City of Seattle,* 92 Wash.2d 905, 602 P.2d 1177 (1979) *(en banc), appeal pending,* 48 U.S.L.W. 3839 (U.S. June 16, 1980) No. 79-1969 was misguided—a decision which was, in large part, premised upon the earlier ruling of the California Supreme Court itself—the California Court concluded that just compensation was required under the Act for removal of signs in industrial and commercial zones.

The California Supreme Court rested its decision upon what it aptly characterized as a "compelled" interpretation of the Federal Highway Beautification Act, 23 U.S.C. § 131 (the "Act"). (A. 34a)** The Act declares a national policy to induce states to establish and maintain "effective control" of outdoor advertising adjacent to the Interstate and primary highway systems by state action: (1) prohibiting erection and maintenance of outdoor advertising devices in certain specified non-commercial areas, (2) promoting the reasonable, orderly and effective display of outdoor advertising in commercial areas and (3) requiring payment of just compensation to the sign owner and land owner for structures covered by the Act, of which payment the Federal share is 75%.

The State of California chose to implement this national policy by a legislative enactment, Cal. Bus. & Prof. Code § 5412 (Petitioners' Appendix G-1) and by an agreement

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* Petitioners' Appendix B, at B-23—B-27.

** A copy of a letter from the Federal Highway Administration (the "FHWA") to the California Supreme Court dated March 28, 1980, setting forth the position of the FHWA with respect to relevant interpretation of the Act is annexed hereto as Appendix A. (Pages of the Appendix to this brief are referred to as ("a.—a")).

entered into with the Secretary of Transportation on February 16, 1968. As the California Supreme Court stated, in articulating its conclusion that Section 5412 partially preempts the San Diego ordinance:

> "As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.* (See 55 Op. Cal. Att'y Gen. 1 (1972)) Analysis of the alleged preemptive effect of Section 5412, consequently, requires a review of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701)." (A. 29a; italics in original)

As the California Supreme Court explained, a 10 percent cut in Federal-aid highway funds is required under the Act for any state which fails to provide "effective control" of outdoor advertising signs, displays or devices within 660 feet of Federal-aid primary or Interstate highways.* (A. 29a-30a, *see* 23 U.S.C. § 131(b) at a. 10a-11a) "Effective control", as defined under subsection (c), in turn requires that all signs within 660 feet of Federal-aid primary and Interstate highways must be removed, "except for official and directional signs, signs advertising property for sale or lease, on-site advertising, landmark signs, and signs advertising free coffee."** (a. 11a-12a)

Subsection (d) affords any state the option to "agree with the Secretary of Transportation to permit signs whose size, lighting and spacing are consistent with customary usage in areas zoned commercial and industrial. . . ." (a. 12a-13a) However, under subsection (g) of the statute,

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* As the California Court noted, the Act's coverage extends, as well, to other signs not at issue in this litigation. (A. 29a-30a)

** The Federal Highway Beautification Act is printed as part of Appendix A to this brief at a.10a-18a.

"just compensation shall be paid upon the removal of *any* outdoor advertising sign, display or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to this section." (a. 13a-14a, italics added)

The California Supreme Court concluded that signs within commercial and industrial areas do not fall within any exemption in subsection (c). It also concluded that although agreement may be reached under subsection (d) to permit signs to remain in "areas zoned commercial and industrial", no municipality may *remove* such signs without conforming to the compensation requirements of subsection (g) of the Act. Such an attempt is preempted by Cal. Bus. & Prof. Code § 5412 which implements the Act in California. The Court predicated its holding upon the explicit formulations of the Act's requirements by Congress itself:

> "The Report of the House Committee on Public Works and Transportation indicated that whenever a state or local government did not exercise its option to enter into an agreement with the Secretary of Transportation to protect signs in commercial and industrial areas, then no distinction could be drawn between signs which could be protected by agreement under subsection (d) and those which could not; 'all of the signs are nonconforming with the "effective control" requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal . . . [J]ust compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c).' (Report No. 95-1485, p. 16, U.S. Code Cong. & Admin. News 1978, pp. 6575, 6592)." (A. 34a-35a)

The Court considered and rejected the argument raised in *Ackerley Communications, Inc.* v. *City of Seattle, supra,*

that compensation was not required for signs removed from commercial and industrial zones. It concluded:

> "We must respectfully disagree with the analysis of *Ackerley*. In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement—specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently it requires compensation when those signs are removed." (A. 35a, footnote omitted.)

As the California Supreme Court recognized, "The literal language of the federal act therefore compels compensation." (A. 34a) And as the Court additionally decided, Section 5412 of the Cal. Bus. & Prof. Code requires the payment of just compensation by the state if such compensation is required under federal law. (A. 29a) The Court therefore held that San Diego's attempt to effect an uncompensated removal of signs in commercial and industrial areas for which compensation was required jeopardized the state's receipt of federal highway funds, and was thus preempted by state law. (A. 38a-39a)

The Court also considered and rejected an argument that the Act violated the Tenth Amendment.

ARGUMENT

I.

The Decision of the California Supreme Court as to the Meaning of the Federal Highway Beautification Act Was Plainly Correct and Does Not Provide an Appropriate Basis for Granting the Conditional Cross Petition.

At the outset, we do not quarrel with the proposition that the ruling of the California Supreme Court with respect to compensation is inconsistent with that of the Supreme Court of Washington in *Ackerley Communications, Inc.* v. *City of Seattle*, 92 Wash.2d 905, 602 P.2d 1177 (1979) *(en banc)*, *appeal pending*, 42 U.S.L.W. 3839 (U.S. June 16, 1980) (No. 79-1969). If that inconsistency were in and of itself sufficient to warrant the granting of the conditional cross petition, there would be little more to argue at this time. But the inconsistency, although relevant, is hardly dispositive. For one thing, the *Ackerley* ruling relies in large part on the very opinion of the California Supreme Court which that Court later vacated. The basic inconsistency is therefore one which is, in effect, between the initial opinion in this case and the later one.

Moreover, the Federal Highway Administration promptly and vigorously disavowed the interpretation of the Washington Supreme Court, stating that:

> "Signs in commercial and industrial areas are not exempted from control under section 131(c), but are treated separately in section 131(d). The underlying controls of section 131(c) continue to apply to signs permitted by section 131(d)." * Letter of Edward V.

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* A copy of this correspondence, which was filed with the California Supreme Court, is annexed hereto as Appendix B.

A. Kussy, Deputy Assistant Chief Counsel, Federal Highway Administration.

The Federal Highway Administration responded in this case, as well, to a similar contention. When asked by the California Supreme Court itself about "the compensability of signs in commercial and industrial areas" (a. 1a) the FHWA response was unequivocal:

> "Federal law rejects the use of amortization to remove lawfully erected signs adjacent to the two controlled highway systems. The compensation requirements are set forth in 23 U.S.C. 131(g). Thus, owners of signs lawfully erected which do not conform to section 131(c) must receive compensation upon removal if a State is to be in compliance with Federal law. Signs in commercial and industrial areas that are permitted under section 131(d) but do not conform to section 131(c) would also fall within the compensation requirements of section 131(g). Failure to provide compensation in accordance with Federal requirements could subject a State to a 10 percent reduction of its Federal-aid highway apportionment. 23 U.S.C. 131(b)." Letter of Lorenzo Casanova, Chief Counsel of the Federal Highway Administration. (a. 2a)

As the California Supreme Court correctly noted, "Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act, its interpretation of the Act merits great weight. (*See, e.g., Northern Ind. Pub. Serv. Co.* v. *Walton League* (1975), 423 U.S. 12, 15, 96 S.Ct. 172, 173, 46 L.Ed.2d 156. . . .)" (A. 36a)

Based on just such a straightforward reading of the statute, the California Supreme Court correctly con-

cluded that "the literal language of the federal act therefore compels compensation" upon removal of advertising displays within commercial and industrial areas covered by the Act. (A. 34a) The Court recognized that it was not presented with a question of interpretation, but a "compelled" conclusion, one mandated by prior legislative history, interpretive pronouncements, and ultimately, the literal language of the Act itself.

In enacting the Federal Highway Beautification Act and in its subsequent history, Congress sought an even-handed solution to the issue of outdoor advertising regulation. While the Administration and Congress desired the complete removal of outdoor advertising signs in certain rural and scenic areas, they recognized the value of outdoor advertising as a means of communication in areas where commerce and industry took place and enacted subsection (d) which allowed the states to leave signs in place in commercial and industrial areas if they chose to do so, subject to regulations concerning size, height and spacing. This was based upon the understanding that outdoor advertising was a highly useful medium.

Both the Johnson Administration and the Congress made clear their conclusion that the outdoor "advertising industry . . . is an *important and legitimate business enterprise*" and that that conclusion was "essential to any evaluation of this legislation." H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News 3710, 3712 (emphasis added). Secretary of Commerce Connor expressly noted that the new federally assisted highways were "opening up vast areas of inestimable value for commercial and industrial activities." (Letter of John T. Connor, Secretary of Commerce, *reprinted in* H.R. Rep. No. 1084, *supra*, [1965] U.S. Code Cong. & Ad. News at 3714).

In this context, Secretary Connor stated that if the states chose to permit outdoor advertising in these areas, he contemplated developing "standards for outdoor advertising [which] would be aimed at assuring a pattern of reasonable development. . . ." *Id.* The Senate Committee on Public Works in turn stated that "outdoor advertising is an integral part of the business and marketing function and an established segment of the national economy; as a legitimate business, it should therefore be allowed to operate where other industrial and commercial activities are conducted."* S. Rep. No. 709, 89th Cong., 1st Sess. 6 (1965). It is simply beyond cavil that, as the testimony cited above illustrates, outdoor advertising in commercial and industrial areas was expected to continue to exist.

It is equally evident that mandatory compensation is the *only* method of compensation which Congress has ever permitted under what is now Section 131(g) of the Act—including, but not limited to, the removal of outdoor advertising in industrial and commercial areas. The 1965

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* Two years later during review of this legislation and consideration of proposed amendments, the Report of the Senate Committee reiterated this same view:

> "The legitimate needs of business were recognized by providing that advertising signs, displays, and devices along the Interstate and primary systems would be allowed in zoned and unzoned industrial and commercial areas. . . ." S. Rep. No. 542, 90th Cong. 1st Sess. 2 (1967),

following and taking note of the testimony of Federal Highway Administrator Lowell Bridwell's testimony before the House Subcommittee that:

> "The Highway Beautification Act of 1965 . . . specifically recognizes the rightful place of outdoor advertising by stating it shall be permitted and in fact, promoted within zoned and unzoned commercial and industrial areas. . . ." *Review of Highway Beautification: Hearings on H. R. 7797 before Subcomm. on Roads of House Comm. on Public Works,* 90th Cong., 1st Sess. 938 (1967).

measure, as originally introduced was administration-sponsored and proposed an amortization approach as a substitute for compensation. That was firmly rejected by Congress, S. Rep. No. 709, 89th Cong., 1st Sess. 7 (1965); H.R. Rep. No. 1084, 89th Cong., 1st Sess. 2, 10 (1965), *reprinted in* [1965] U.S. Code Cong. & Ad. News at 3712, 3719. The latter states (p. 10):

> "The Committee intends, once again, as in dealing with billboard control, that 'safety' referred to in this section is not in any way intended to allow the exercise of police powers under this legislation so as to prevent the payment of compensation which is authorized to be paid by this bill." *

In the 90th Congress, proposals were advanced to make compensation permissive rather than mandatory. On the Senate side, the Committee Report expressed firm views regarding the compensation provision:

> "The issue of compensation for those affected by the required removal of signs was raised during the hearings. Proposals were presented to repeal the provisions of section 131(g) in their entirety or to make such compensation permissive rather than mandatory. The Committee discussed this matter and reaffirmed its belief that mandatory compensation was neces-

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* In fact, the original wording of subsection 101(g) of the Act (23 U.S.C. Sec. 131(g)) was as follows:

> "'(g) Whenever a State shall submit evidence satisfactory to the Secretary that it is unable to secure effective control, as herein provided, under its police powers, Federal-aid funds may be used to pay the Federal pro-rata share of costs of providing effective control by purchase or condemnation.'" *Highway Beautification and Scenic Road Program: Hearings on S. 2084 Before Subcomm. on Public Roads of Senate Comm. on Public Works*, 89th Cong., 1st Sess. 2 (1965).

> sary as a matter of simple justice." S. Rep. No. 542, 90th Cong., 1st Sess. 10 (1967).

The House Committee on Public Works, at this same session, in its Report was equally dedicated to the concept of compensation:

> "Section 131(g) . . . of the Highway Beautification Act of 1965, clearly and unequivocally requires that just compensation shall be paid upon the removal of certain specifically described outdoor advertising . . . other alternative methods of handling the compensation requirement, including amortization, were considered and rejected when the . . . Act was enacted." H.R. Rep. No. 713, 90th Cong. 1st Sess. 5 (1967).*

In 1966, the United States Secretary of Commerce requested from the Attorney General an opinion regarding the ability of states to use their police power to remove structures without paying compensation and avoid the 10% penalty. Acting Attorney General Clark examined the legislative history of the Act carefully and concluded that the wording of section 131(g) was intended to leave no room for a penalty-free election of noncompliance with the directive that the states provide for, and bear part of the expense of, just compensation. He concluded that "the

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* The most comprehensive legal analysis of the Federal Highway Beautification Act summarizes:

> "Without exception, these hearings and floor debates [from 1967 through 1969] reinforce the conclusion that Congress intended to require the payment of compensation upon removal of advertising signs as a condition of avoiding the ten per cent penalty." Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 Mich.L.Rev. 1295, 1312 (1973) (footnote omitted).

mandatory aspect of Section 131(g) was well understood by the members of Congress. . . ." * 42 Op. Att'y Gen. 331, 333-34 (1966).

That Congress had no intention of excluding industrial and commercial zones from its guarantee of just compensation was made clear by its passage of the Surface Transportation Assistance Act of 1978 (Pub. L. No. 95-599, 92 Stat. 2689 (pertinent section codified in 23 U.S.C. § 131 (Supp. II 1978))). The amendments were intended to answer the precise question raised by this litigation. In fact, the House Public Works Committee answered the very arguments raised by San Diego in its petition:

> "In some instances, actions have been taken to remove signs, without the payment of just compensation, which could be retained in zoned and unzoned industrial and commercial areas under the provisions of subsection (d) of section 131, title 23, United States Code. Subsection (c) of section 131 establishes the requirements for 'effective control' pursuant to the Highway Beautification Act by limiting signs, displays, and devices which may be erected and maintained adjacent to the Interstate system and the

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* A State judicial challenge to the constitutionality of the Federal Act was initiated by Vermont which had passed legislation prohibiting outdoor advertising on private property adjacent to all segments of all highways in the State. *Vermont* v. *Brinegar*, 379 F.Supp. 606 (D. Vt. 1974). In approving a ruling of the Secretary of Transportation that the State's policy not to pay just compensation constituted a failure to establish "effective control" within the meaning of the Federal Act, the Court stated that:

> ". . . just compensation for signowners affected by the Act was a foremost congressional consideration as both the mandatory language of Subsection (g) of Section 131 and the legislative history reveal. We believe that the compensation of signowners is an integral aspect of the statutory scheme and is a policy that is 'legitimately national.'" *Id.* at 616.

Federal-aid primary system. . . . To promote the reasonable, orderly, and effective display of outdoor advertising, while remaining consistent with the purposes of the Highway Beautification Act, subsection (d) of section 131 permits an exemption from the 'effective control' under subsection (c) for signs, displays, and devices whose size, lighting, and spacing are consistent with customary use as determined by agreement between the States and the Secretary, or by the State, county or local zoning authority, within zoned and unzoned industrial and commercial areas. State and local authorities have the discretion whether or not to implement this exemption."

"If a State or *local government does not exercise the exemption in subsection (d)* to permit signs that are consistent with customary use of size, lighting, and spacing to be erected and maintained, then *there is no distinction between signs in industrial and commercial areas. Except for the four classes of signs permitted by subsection (c), all of the signs are nonconforming with the 'effective control' requirements of subsection (c), and the committee is of the opinion that subsection (g) requires payment of just compensation for their removal.* It would be grossly inequitable to pay compensation for removal of signs in industrial and commercial areas which are not consistent with customary use of size, lighting, and spacing, but not pay for the removal of signs in such areas which would be consistent with such customary use except for the failure of the State or local government to exercise the exemption permitted by subsection (d)." H. R. Rep. No. 95-1485, 95th Cong., 2d Sec. 14-16 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 6591-92 (emphasis added).

The House and Senate versions of the proposed amendments were sent to conference and, in conference, the House version was adopted. *See* H.R. Conf. Rep. No. 95-1797 at 97 (Oct. 14, 1978).

That Congress had directed its just compensation requirement to apply to industrial and commercial areas has been repeatedly underscored by the Federal Highway Administration. Not only did the FHWA so inform the California Supreme Court but when the Oregon Assistant Attorney General inquired of the FHWA whether "the amendments to the Highway Beautification Act restrict the ability of cities and counties to remove . . . outdoor advertising signs . . . located in commercial or industrial zones," the FHWA responded:

> "The amendments to Title 23 sections 131(g) and 131(k) very clearly require the payment of just compensation upon the removal of any signs adjacent to the Interstate and Federal-aid primary systems which are not permitted under 23 U.S.C. section 131(c). The legislative history makes clear that the use of amortization by State or local authority would not be in conformance with 23 U.S.C. section 131(g). *Thus, when a sign is located in a commercial and industrial area adjacent to a controlled highway, compensation must be forthcoming upon removal.* If the State is unable to prevent such removal by local authorities, the State would not be in compliance with the Highway Beautification Act and would be subject to the penalty provisions of 23 U.S.C. Section 131(b)." Letter of Irwin L. Schroeder, Assistant Chief Counsel of the Federal Highway Administration (emphasis added).*

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* A copy of this letter, as submitted to the California Supreme Court, is annexed hereto as Appendix C.

It is thus plain that a state has the option: (a) of establishing and maintaining "effective control", including, *inter alia,* the payment of just compensation for the removal of outdoor advertising within 660 feet of any "controlled" highway—including such a highway within a commercial or industrial zone—thus, preserving its Federal highway apportionment annually, *or* (b) making its own arrangements for the regulation of outdoor advertising, without reference to the national policy as reflected in 23 U.S.C. § 131, and suffering the penalty of an annual reduction of 10% of its Federal-aid highway funds. California chose the first option. It specifically responded to the Federal Act by legislative enactment for the purpose of preserving its full share of Federal funds. But "effective control" must be maintained under the statute, 23 U.S.C. §§ 131(a), (b), and compensation paid, 23 U.S.C. § 131(g). The State having so legislated and agreed, the San Diego Ordinance requiring amortization of—but no compensation for—nonconforming structures adjacent to the Interstate and primary systems was interdicted. The Ordinance jeopardized Federal highway funds for the entire state for all its highways. This was expressly recognized by the Supreme Court of California, which therefore correctly concluded that the San Diego Ordinance was partially preempted by state law. (A. 28a-29a)*

In light of the above, it is all the more remarkable that petitioners should themselves rely upon, as their concededly

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* The California Court's conclusion was not only mandated if California wished to fulfill its agreement under 23 U.S.C. § 131, but had been earlier recognized as the necessary interpretation of California's implementing legislation. The Attorney General of California had ordered the Sacramento County Board of Supervisors not to utilize its police power to force the removal of nonconforming structures by amortization in order to avoid the 10% penalty against the State. 55 Op. Cal. Att'y Gen. 1, No. 71-102 (1972).

sole "authority" for the statutory "interpretation" they urge, a single letter from the Office of the Chief Counsel of the Federal Highway Administration on March 11, 1976. Petitioners acknowledge that even this supposed authority was expressly revoked by a letter on December 5, 1978. (a. 8a-9a) It is precisely because of that revocation, due to Congressional clarification of the Act in 1978, that the Supreme Court of California vacated its previous opinion in this case and upon rehearing, conformed its interpretation of the Act to that required by Congress. Yet on the basis of an expressly revoked letter, petitioners contend that this Court should grant their conditional cross petition and then interpret an Act of Congress contrary to its explicit terms.

Equally express statements by Congress rebut petitioners' argument that the 1978 amendments to the Act are not retroactive.* Congress has clearly stated that the amendments merely served to make explicit what Congress had previously assumed to be implicit in the Act—that municipalities may not, merely by denominating an action as pursuant to the police power, eviscerate a congressional regulatory scheme. As the Report of the House Committee on Public Works and Transportation noted:

> "Subsections (a) and (b) of Section 116 [subsections (g) and (k) of Section 131] would *clarify existing law* to make sure that just compensation is paid upon the removal of any lawfully erected sign which does not conform with the requirements for 'effective control' under the Highway Beautification Act." H.R. Rep. No. 95-1485, 95th Cong., 2d Sess. 14 (1978), *reprinted in*

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* We need do no more than note, as did the Supreme Court of California in a footnote to its decision, A. 36a, n. 26, that the 1978 amendments govern regardless of their retroactivity since the signs in question were signs either in existence in 1978, or subject to litigation on that date.

[1978] U.S. Code Cong. & Ad. News 6565, 6592 (emphasis added).

The Federal Highway Administration has mirrored this conclusion:

> "Section 131(g) took its present form as the result of amendments contained in section 122 of the Surface Transportation Act of 1978, Pub. L. 95-599, November 6, 1978. We have interpreted the 1978 amendments to reach all lawfully erected signs in existence on November 6, 1978, all lawfully erected signs which were removed prior to November 6, but were still the subject of litigation on that date, and all signs lawfully erected thereafter." (a. 2a)

It is this explicit expression of congressional intent and administrative interpretation with which San Diego differs. But such a difference is less one as to law—which we submit, is plain—than as to what policy Congress should, in the view of San Diego, have adopted. It hardly provides a basis for granting the conditional cross petition.

II.

The Federal Highway Beautification Act Is Consistent With the Tenth Amendment.

No decision of this Court has ever reached the alternative conclusion that San Diego urges here: that legislation such as the Federal Highway Beautification Act violates the Tenth Amendment. Using the standard applied by this Court in *United States* v. *Darby,* 312 U.S. 100, 124 (1941) that the Tenth Amendment does not "depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end," decisions have uniformly recognized that mere inducement by Congress to follow a national policy cannot amount to "coercion" . . . "under the strain of a persuasion equivalent to undue influence. . . ." *Steward Machine Co.* v. *Davis Collector of Internal Revenue,* 301 U.S. 548, 590 (1937).

The Federal Highway Beautification Act is similar to the long line of Congressional enactments approved by this Court in which Congress has conditioned the receipt of funds upon the states' performance of certain statutory criteria.* For example, in *Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127 (1947), the State of Oklahoma challenged the decision of the United States Civil Service Commission to deprive the state of a portion of its federal highway funds because a state highway administrator had violated the Hatch Political Activity Act.

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* Each Court that has considered the issue, as well as the Attorney General in his advisory opinion, has followed this reasoning in response to Tenth Amendment challenge. *See e.g. Metromedia* v. *City of San Diego,* A. 39a, n.28; *Vermont* v. *Brinegar,* 379 F.Supp. 606, 616 (D. Vt. 1974); *Lamm* v. *Volpe,* 449 F.2d 1202, 1203 (10th Cir. 1971); 42 Op. Att'y Gen. 331, 338 (1966).

In upholding this conditioning of funds against Tenth Amendment challenge, the Court reiterated:

> "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143.*

The Court also noted:

> "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." 330 U.S. at 144 (footnote omitted).

Since compensation of sign owners is a primary objective of the Federal Highway Beautification Act, Congress plainly has the power to effectuate the relationship between the overall goals of its highway aid program, through "effective control" over advertising displays and set the terms of its grant accordingly.

By legislative enactment and agreement with the Department of Transportation, the State of California de-

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* Despite the City of San Diego's citation to and reliance upon *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), a decision that explicitly rests upon the Commerce Clause of the Constitution, in that decision this Court was addressing the far more intrusive congressional extension of the Fair Labor Standards Act to cover state employees—an enactment akin to a direct attempt to "regulate local political activities." *Oklahoma* v. *United State Civil Service Commission, supra*, 330 U.S. at 143. Both in *Usery* and subsequent cases, this Court has recognized that the Court there faced the direct "displace[ment of] the States' freedom to structure integral operations in areas of traditional governmental function" 426 U.S. at 852. *See also Rome* v. *United States*, 100 S.Ct. 1549, 1563 (1980), *Beame* v. *Friends of the Earth*, 434 U.S. 310 (1977) (Marshall, J., opinion in chambers). No such issue is raised here.

cided to entitle itself to a 75 percent federal contribution to the cost of just compensation for sign owners. That Congress influenced this choice is of no consequence. As this Court stated in *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923):

> "If Congress enacted [the statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." *Id.* at 482.

California possessed the option of accepting the ten percent penalty and making its own arrangements for the regulation of billboards. It simply cannot be said, especially "when considered in relation to a state's entire allocation of Federal highway aid" that such a penalty "irresistably compels a state under threat of economic catastrophe to embrace the federal plan." *Vermont* v. *Brinegar*, 379 F.Supp. 606, 617 (D. Vt. 1974).

The assertion of Tenth Amendment rights by San Diego in this litigation is thus totally unsound, one which can hardly justify the granting of the conditional cross petition.

CONCLUSION

The Court should note probable jurisdiction in No. 80-195 and should deny the conditional cross petition sought in 80-196.

Respectfully submitted,

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Attorneys for Respondents

September 9, 1980

APPENDIX

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APPENDIX—

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APPENDIX A

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
Washington, D.C. 20590

28 MAR 1980

Mr. J. L. Kavanagh
Chief Deputy Clerk
Supreme Court of California
4250 State Building
San Francisco, California 94102

RE: *Metromedia, Incorporated* v. *City of San Diego,* Sup. Ct. of California, No. L.A. 30782

Dear Mr. Kavanagh:

By letter of January 17 to Mr. Edward Kussy, Deputy Assistant Chief Counsel for Right-of-Way and Environmental Law, you asked what the position of the Department of Transportation was with respect to the compensability of signs in commercial and industrial areas. We indicated by letter of January 25 that we would require approximately 60 days in which to reply.

The Highway Beautification Act, 23 U.S.C. 131, requires States to control signs adjacent to Interstate and Federal-aid primary highways. The required controls are set forth in 23 U.S.C. 131(c). The law also allows States to retain signs in commercial and industrial areas which conform to a State/Federal agreement regulating the size, lighting and spacing of the signs in these areas. 23 U.S.C. 131(d).

Appendix A

Federal law rejects the use of amortization to remove lawfully erected signs adjacent to the two controlled highway systems. The compensation requirements are set forth in 23 U.S.C. 131(g). Thus, owners of signs lawfully erected which do not conform to section 131(c) must receive compensation upon removal if a State is to be in compliance with Federal law. Signs in commercial and industrial areas that are permitted under section 131(d) but do not conform to section 131(c) would also fall within the compensation requirements of section 131(g). Failure to provide compensation in accordance with Federal requirements could subject a State to a 10 percent reduction of its Federal-aid highway apportionment. 23 U.S.C. 131(b).

Section 131(g) took its present form as the result of amendments contained in section 122 of the Surface Transportation Act of 1978, Pub. L. 95-599, November 6, 1978. We have interpreted the 1978 amendments to reach all lawfully erected signs in existence on November 6, 1978, all lawfully erected signs which were removed prior to November 6, but were still the subject of litigation on that date, and all signs lawfully erected thereafter.

We have enclosed memoranda dated December 5, 1978, March 5, 1979, and March 6, 1979, which address these matters. Also enclosed for the court's convenience is a copy of 23 U.S.C. 131, as recently amended by Pub. L. 95-599.

Appendix A

We appreciate this opportunity to comment. As you requested, all parties to the above litigation have been sent copies of this letter.

Sincerely yours,

Lorenzo Casanova

Lorenzo Casanova
Chief Counsel

4 Enclosures

cc: Mr. John W. Witt
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Appendix A

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION

Memorandum Federal Highway Administration

Date: March 6, 1979

Subject:

Just Compensation for Signs

From:

Federal Highway Administrator

To:

Regional Federal Highway Administrators, Regions 1-10, Regional Engineer, Region 15

On December 5, 1978, a memorandum was issued to all Regional Administrators to explain the impact of the 1978 amendments to the Highway Beautification Act contained in the Surface Transportation Assistance Act, P.L. 95-599, November 6, 1978.

Since its issuance, that memorandum has been the subject of considerable discussion with the House Committee on Public Works and Transportation. The Committee has expressed concern that the December 5 memorandum does not reflect the true scope of the 1978 amendments.

Attached is a memorandum by the Chief Counsel which deals with the concerns raised by the Committee. Thus, it should be clear that all lawfully erected signs still in existence on November 6, 1978, and those additional signs which were removed prior to November 6, 1978, but were the subject of litigation pending on that date are entitled to compensation under 23 U.S.C. 131(g) and (k).

Appendix A

We will be issuing several notices over the next few weeks concerning the outdoor advertising control program. It is hoped that this memorandum will assist you in interpreting those notices.

/s/ KARL S. BOWERS
Karl S. Bowers

Attachment

Appendix A

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION
Memorandum Federal Highway Administration

Date: MAR 5 1979

Subject:
INFORMATION: Just Compensation for Signs

From: Chief Counsel

To: Mr. Karl S. Bowers
Federal Highway Administrator

On December 5, 1978, you issued a memorandum to all Regional Administrators to explain the impact of sections 122(a) and 122(b) of the Surface Transportation Assistance Act of 1978, amending 23 U.S.C. section 131 (g) and (k).

That memorandum indicated, among other things, that:

> "the statute requires the States to provide just compensation upon the removal of signs *legally in existence* on or after November 6, 1978, the effective date of the 1978 amendments, which do not conform to the definition found at 23 U.S.C. section 131(c) if they wish to remain in compliance with the Highway Beautification Act." [Emphasis added.]

The House Committee on Public Works and Transportation has indicated that this language does not accurately reflect the true scope of the 1978 amendments. Accordingly, the statute is to be interpreted to require the States to provide compensation upon removal of signs which were lawfully erected under State law. As a matter of administrative policy, the FHWA will not require the payment of just compensation for signs that

were not in existence on November 6, 1978, except for any such signs that were the subject of pending litigation on that date. Failure to provide compensation for signs that are subject to pending litigation or in existence on November 6, 1978, will be in violation of 23 U.S.C. section 131(b), exposing a State to reduction of its Federal highway apportionment.

/s/ Lorenzo Casanova
Lorenzo Casanova

Appendix A

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

Date: December 5, 1978

Subject: INFORMATION: Just Compensation for Signs

From: Federal Highway Administrator

To: Regional Administrators

Regions 1-10 and 15

Sections 122(a) and 122(b) of the Surface Transportation Assistance Act of 1978 amended sections 131(g) and (k) of title 23, U.S.C. to read as follows:

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law *and not permitted under subsection (c)* of *this section, whether or not removed pursuant to or because of this section.* The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

• • • • •

(k) [Nothing] *Subject to compliance with subsection (g) of this section for the payment of just com-*

pensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

[New language is underlined, stricken language is in brackets.]

These two amendments overrule an opinion on the subject of this memorandum by the Chief Counsel transmitted to your office by former Federal Highway Administrator Norbert T. Tiemann on December 8, 1976. Similarly affected are memorandums issued September 6, 1972 and December 13, 1974, dealing with ordinances in New Castle, Delaware and Madison, Wisconsin, on the above subject and withdrawn by the Chief Counsel in memorandums of June 20 and August 20, 1975. The statute requires the States to provide just compensation upon the removal of signs legally in existence on or after November 6, 1978, the effective date of the 1978 amendments, which do not conform to the definition found at 23 U.S.C. section 131(c) if they wish to remain in compliance with the Highway Beautification Act. As of November 6, 1978, non-compliance with the compensation requirement will subject a State to the penalty provisions as provided by Title 23, section 131(b).

Among other actions concerning the program is a proposed review of the entire outdoor advertising control program, including appropriate issuances in the Federal Register and public hearings. We anticipate sending out more specific guidance in this area in the very near future.

/s/ KARL S. BOWERS
Karl S. Bowers

Appendix A

23 U.S.C. § 131 as most recently amended:

§ 131. Control of outdoor advertising.

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this

title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22,

1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and de-

vices referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be

entitled to such payments unless the State maintains the control required under such agreement: *Provided,* That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination.

Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967,

not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the

United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

APPENDIX B

U.S. Department of Transportation
Federal Highway Administration
Washington, D.C. 20590

Mr. Eric M. Rubin
Wolf, Block, Schorr & Solis-Cohen
Eleventh Floor Connecticut Building
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Rubin:

This is in response to your letter of December 14 regarding a decision by the Supreme Court of Washington in *Ackerley Communications, Inc.* v. *City of Seattle* (No. 45281, November 21, 1979). You ask for an expeditious response because a petition of reconsideration is apparently pending before the court.

We have not been able to review the pleadings and factual background of this case and we have no specific knowledge of the precise nature of the signs at issue. Furthermore, since this matter is still under litigation, we will not comment on the merits of the case and will limit the answers to an explanation of the applicable Federal statute.

The Highway Beautification Act of 1965 as amended, 23 U.S.C. 131, defines the areas in which signs must be controlled. The areas subject to control include:

(1) Areas within 660 feet of the right-of-way of Interstate and Federal-aid primary highways.

(2) Areas outside of urban areas and beyond 660 feet of the right-of-way of Interstate and Federal-aid primary highways.

Appendix B

Signs within 660 feet (group 1) must be controlled if they are "visible" from main traveled way of such highways. Signs beyond 660 feet of the right-of-way of such highways and outside of urban areas (group 2) must be controlled if they are visible and erected with the purpose of their message being read from the main traveled way of the highway. Thus, *within* 660 feet of the right-of-way of such highways signs must be controlled whether or not they are in urban areas. Signs *in urban areas beyond* 660 feet of the right-of-way are not reached by the Act.

This reading of the Act is clearly supported by the legislative history of P.L. 93-643, which extended the control provisions of the Act to areas beyond 660 feet of the right-of-way. A copy of that Public Law and the House, Senate, and Conference Reports are enclosed for your information. We call your attention to section 109 of the Public Law, and pages 20-21 of the Conference Report, page 4 of the House Report, and page 13 of the Senate Report. Urban areas are defined in 23 U.S.C. §101(a).

It should be noted further that only signs adjacent to Interstate and Federal-aid primary highways must be controlled under Federal law. These highway systems are defined in 23 U.S.C. §103(e) and (b), respectively. Signs along highways not on either of these two systems or signs located beyond 660 feet of the rights-of-way of highways on these systems, if in urban areas, are not reached by the Act and are not subject to any of the Act's provisions.

There is a clear difference between 23 U.S.C. §131(c), the definition of effective control, and 23 U.S.C. §131(d), relating to signs in commercial and industrial areas. Section 131(c) exempts certain classes of signs from the effective

control provisions of the Act. In some cases, such as directional and official signs, regulatory provisions are required which impose controls. Other signs, such as "on property" or "for sale or lease" signs, are wholly uncontrolled by the Act (it should be noted that the 1958 "Bonus" law results in certain controls on these signs because Washington participates in the voluntary bonus program, 23 U.S.C. §131(j)).

Signs in commercial and industrial areas are not exempted from control under section 131(c), but are treated separately in section 131(d). The underlying controls of §131(c) continue to apply to signs permitted by section 131(d). See *South Dakota* v. *Volpe*, 353 F. Supp. 335 (D.S.D., 1973).

Signs within commercial and industrial areas are not required by Federal law to be removed if they conform to an agreement each State has with the Secretary regarding the size, lighting, and space of signs in the areas. This agreement also defines what is to be an "unzoned" commercial or industrial area. Section 131(d) allows local size, lighting, and spacing standards to govern in certain circumstances. Failure to have agreement does not result in no controls, but results in no special exemption for signs in commercial or industrial areas.

Washington's agreement provides for size, lighting, and spacing of newly erected signs, and allows signs existing on the date of the agreement in commercial and industrial areas to remain, even if they do not conform to these standards. The agreement did not exclude the pre-1971 signs in commercial and industrial areas, but merely recognized that it would be counter-productive to apply the new stan-

dards to them. Pre-1971 signs are treated as "grandfathered" signs. See 23 CFR §§750.706 and 750.707(c).

In 1978, the Congress amended the just compensation provisions of the Act, requiring that legally erected signs which do not conform to §131(c) must be paid for upon removal. See §122(a) and (b) of P.L. 95-599, November 6, 1978, copy enclosed. The legislative history of the 1978 Amendment indicates that the Congress sought to eliminate amortization as a means of removing signs in areas subject to the controls of the Act. This compensation requirement clearly extends to removals of signs in commercial and industrial areas, since these signs are "not permitted by §131(c)." This is made even more clear because the Senate initially sought to limit the extent of the 1978 Amendments by not requiring compensation upon removal in commercial and industrial areas (see S. Rept. 95-833, p. 14-15, copy enclosed). This approach was rejected by the Conference Committee in favor of the broader version eventually adopted (see the Conference Report (H. Rept. 95-1797), copy enclosed).

The specific reference to §131(c) in both the amendments to §§131(g) and 131(h) is deliberate. While compensation is not required for signs "conforming to", i.e., specifically permitted by, §131(c)(1)-§131(c)(5), compensation is clearly required for sign permitted under §131(d).

Our initial interpretation of the 1978 amendments was that property rights extinguished by operation of law prior to the effective date of the 1978 amendments were not within the ambit 23 U.S.C. §131(g) as amended. However, further review of the legislative history, coupled with very clear expressions of concern by the drafters of the 1978 Amendment in the Congress, indicated that extinguishment of property rights through amortization could not be used to

remove signs not permitted by §131(c), lawfully erected in areas subject to effective control under 23 U.S.C. §131.

We noted this in our memoranda of March 5 and March 6, 1979. Of course, States may continue to reasonably regulate outdoor advertising. A sign violating reasonable regulations may be terminated by operation of law. We have dealt with the continuing authority of States and localities to regulate billboards in a series of questions and answers regarding the 1978 Amendments. These are enclosed for your information.

Under the Highway Beautification Act, 23 U.S.C. §131(g), the payment of just compensation is part of effective control. Failure to provide compensation in accordance with § 131(g), as discussed in this letter, exposes a State to sanctions under §131(b). See *State of Vermont* v. *Brinegar*, 379 F. Supp. 606 (D. Vt., 1973).

We trust this answers your questions. We have provided copies of this letter to the State of Washington, the city of Seattle, and the parties to the lawsuit which is the subject of this letter.

Sincerely yours,

/s/ Edward V.A. Kussy
Deputy Assistant Chief Counsel
Right-of-Way and Environmental Law

Enclosures

cc:
Thomas Garlington—Chief Counsel
Ronald Schaps—Attorney for Ackerley Communications, Inc.
Charles Brown—Assistant City Attorney—Seattle, Washington

Appendix B

December 14, 1979

Edward V. A. Kussy
Deputy Assistant Counsel
Federal Highway Administration
400 C Street, S. W.
Washington, D. C. 20590

Dear Mr. Kussy:

I am writing to you on behalf of my client, the Outdoor Advertising Association of America. As you may already know, on November 21, 1979, the Supreme Court of the State of Washington rendered an opinion in *Ackerly Communications, Inc. et al.* v. *City of Seattle et al.* No. 45281, —— P. 2d —— (1979). A copy of the slip opinion is enclosed for your convenience.

At issue in this case is the validity of an ordinance promulgated by the City of Seattle which requires the removal, after a three year amortization period, of certain billboards which had been lawfully erected under state and local law. The ordinance further permits an extension of the amortization period for up to seven additional years and authorizes the granting of certain other variances.

In 1974 and 1975, the City of Seattle notified the plaintiff outdoor companies that certain of their signs were in violation of the ordinance and ordered their removal. The companies then initiated the instant action in which they sought a declaratory judgment that the ordinance was invalid and an order restraining further enforcement. The Superior Court granted summary judgment for the plaintiffs. However, the Supreme Court reversed the lower court in the above referenced decision, upholding

the validity of the ordinance on constitutional grounds and on the basis that the amortization provisions were not precluded by state or federal law.

The specific concern which the OAAA wishes to address to your Office pertains to that portion of the Washington Supreme Court's opinion interpreting the provisions of the Highway Beautification Act. In its decision, the Court egregiously misconstrues the Act, holding that signs located in commercial and industrial zones adjacent to federal-aid highways are outside the ambit of the statute and that just compensation is therefore not required upon their removal.

> We conclude, then, that the federal Highway Beautification Act does not require compensation for those outdoor signs not within the scope of its provisions for effective control. Since respondents' signs are indisputably in commercial and industrial areas of the City, which are not within the effective control provision of the act, and having been erected prior to 1971, are not covered by the agreement between the State of Washington and the Department of Transportation, it is clear that none of the provisions of the federal act, including the compensation requirement, apply to respondents' signs. *Slip opinion at p. 1011.*

As you are aware, that construction is contrary to the plain language of the statute and is inconsistent with the express Congressional intent evidenced in the legislative history underlying its enactment. It is also apparently wholly inconsistent with FHWA's interpretation of the statute. See Memorandum, *Oregon Highway Beautification Just Compensation for Outdoor Advertising Signs,*

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Irvin Schroeder, Assistant Chief Counsel, FHWA to Robert Rutledge, Regional Counsel. February 27, 1979.

Accordingly, the OAAA requests that the Office of Chief Counsel provide specific clarification and guidance concerning the FHWA's continuing construction of the Beautification Act in light of the Washington Supreme Court's decision. In particular, we request your formal view regarding the status under the Act of billboards located in commercial and industrial zones and the eligibility of such lawfully erected signs for just compensation where ordered removed pursuant to a supervening law of a state or subdivision thereof. The OAAA also requests your confirmation that implementation of the Washington Court's decision would evoke the penalty provisions in the Act, thereby resulting in the withholding of 10% of highway funds earmarked for the State of Washington. 23 USC 131(b)

On December 11, 1979, the plaintiffs in *Ackerly Communications, Inc.* petitioned the Washington Court for a rehearing of this case. The OAAA strongly believes that a definitive interpretative statement from your Office would be of material assistance to the Court in its consideration of this petition. Moreover, we are advised that an FHWA construction of the Act and the potential ramifications of the Court's decision would provide useful guidance to Washington State government officials. Beyond this, the OAAA believes that a clear cut legal construction of the Act by your Office at this juncture would be instrumental in averting similar issues from arising in other jurisdictions in the future.

In view of the pendency of the petition now before the Washington Supreme Court, it is critical that your office

respond promptly within a few days to this request. The OAAA appreciates the Office of the Chief Counsel's attention and interest in this matter.

Sincerely,

/s/ Eric M. Rubin
Eric M. Rubin
For
Wolf, Block, Schorr and Solis-Cohen

APPENDIX C

UNITED STATES GOVERNMENT DEPARTMENT OF TRANSPORTATION

Memorandum Federal Highway Administration

Date: FEB 27 1979

Subject:
Oregon—Highway Beautification
Just Compensation for Outdoor
Advertising Signs

From:
Assistant Chief Counsel for
Right-of-Way and Environmental
Law Division

To:
Mr. Louis E. Lybecker
Regional Federal Highway Administrator

Attn:
Mr. Robert B. Rutledge
Regional Counsel

This is in response to your memorandum of January 30, 1979, transmitting a letter from Assistant Attorney General Sollis of Oregon, requesting a legal interpretation of the 1978 amendments to section 131 of Title 23.

The amendments to Title 23 sections 131(g) and 131(k) very clearly require the payment of just compensation upon the removal of any signs adjacent to the Interstate and Federal-aid primary systems which are not permitted under 23 U.S.C. section 131(c). The legislative history makes clear that the use of amortization by State or local authority would not be in conformance

with 23 U.S.C. section 131(g). Thus, when a sign is located in a commercial and industrial area adjacent to a controlled highway, compensation must be forthcoming upon removal. If the State is unable to prevent such removal by local authorities, the State would not be in compliance with the Highway Beautification Act and would be subject to the penalty provisions of 23 U.S.C. section 131(b).

If you have any questions with respect to this memorandum, please contact Mr. Kussy of my office.

/s/ IRWIN L. SCHROEDER
Irwin L. Schroeder